Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

IN RE: HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, HOLYWELL CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Petitioners,

v.

FRED STANTON SMITH, individually and as Trustee of the MIAMI CENTER LIQUIDATING TRUST; THE BANK OF NEW YORK; THE CITY NATIONAL BANK OF MIAMI, as Trustee under Land Trust #5008793; M. C. HOLDINGS PARTNERS, a New York General Partnership, and its General Partners, namely, ROBANK CORPORATION, H. D. LIQUIDATION, INC., ZENTAC INVESTMENTS, INC., BOTT FLORIDA HOLDING CORPORATION, AMERICAN SECURITY LTD., and M. CENTER CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Prior Judgment clause of Rule 60(b)(5) of the Federal Rules of Civil Procedure required that the decision of a court of appeals be vacated, which decision had affirmed a district court's order based on the doctrines of *res judicata* and collateral estoppel when the judgments on which the district court had relied have meanwhile been reversed in decisions cited as *Holywell Corporation v. Smith*, 503 U.S. 47, 112 S.Ct. 1021 (1992) and *In re Holywell Corp.*, 913 F.2d 873 (11th Cir. 1990).

Whether Rule 60(b)(5) of the Federal Rules of Civil Procedures requires the conclusion that it is no longer equitable for the opinion of the court of appeals (which is reported as *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988)), to have prospective application, in order to construe a plan, proposed by the Bank on behalf of the debtors, as binding which is in conflict with another opinion of the same court holding that the Bank's plan did not comply with the Bankruptcy Code's requirements, *In re Holywell Corp.*, 913 F.2d 873 (11th Cir. 1990).

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PETITION FOR WRIT OF CERTIORARI

Holywell Corporation, *et al*,[1] by its undersigned counsel, and Theodore B. Gould, appearing *pro se*, respectfully petition for a writ of certiorari to have the United States Court of Appeals for the Eleventh Circuit vacate its opinions, reported as *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir. 1988), *cert. denied*, 488 U.S. 823 (1988), and *In re Holywell Corp.*, 881 F.2d 1086 (11th Cir. 1989), *cert. denied* 493 U.S. 1057 (1990), in accordance with the provisions of Rule 60(b)(5) of the Federal Rules of Civil Procedure.

OPINIONS OF OTHER COURTS

The *per curiam* opinion of the court of appeals (App. at 1a) is unreported. The opinion of the district court (App. 3a) which affirmed the bankruptcy court's denial of petitioners' motion asking the court to vacate its prior judgment, in accordance with Rule 60(b)(5) of the Federal Rules of Civil Procedure, is unreported. The bankruptcy court's order (App. 9a) is also unreported.

The earlier opinion of the court of appeals, concluding that the amended plan, proposed by the Bank of New York ("Bank") on behalf of the debtors Miami Center Limited Partnership ("MCLP"), Chopin Associates ("Chopin"), Miami Center Corporation, Holywell Corporation ("Holywell"), and Theodore B. Gould, complied with the requirements of the Bankruptcy Code, and that the plan's substantial consummation precluded effective judicial relief, is reported at 838 F.2d 1547 (11th Cir. 1988).

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[1] Petitioner Holywell Corporation has no parent corporation or subsidiaries, other than wholly-owned subsidiaries; petitioner Miami Center Corporation was liquidated under the plan's substantive consolidation provision on October 10, 1985. No other petitioner is a corporation. See S.Ct. R. 29.1.

The conflicting opinion issued on the merits of the same court of appeals, concluding that the bankruptcy court lacked authority to confirm the Bank's amended plan, since it did not satisfy the requirements of 11 U.S.C. § 1129, is reported at 913 F.2d 873 (11th Cir. 1990). The bankruptcy court's later judgment concluding that the Bank was liable for negligent misrepresentation as the proponent of a court-approved plan is reported at 161 B.R. 302 (Bkrtcy. S.D. Fla. 1993).

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1995, App. 2a. The jurisdiction of this Court is invoked under **28 U.S.C. § 1254(1)**.

STATUTORY PROVISIONS AND RULES INVOLVED

The pertinent portions of the text of the statutory provisions, the pertinent provisions of the Federal Rules of Civil Procedure and of the Federal Rules of Bankruptcy Procedure involved in this petition for a writ of certiorari are set forth in the attached appendix: (1) **28 U.S.C. § 1452**, Removal of claims related to bankruptcy cases, App. 44a; (2) **28 U.S.C. § 1334**, Bankruptcy cases and proceedings, App. 44a; (3) **28 U.S.C. § 157**, Procedures, App. 45a; (4) **11 U.S.C. § 105**, Power of court, App. 47a; (5) **Rule 60** of the Federal Rules of Civil Procedure, Relief from Judgment or Order, App. 48a; and (6) **Rule 9024** of the Rules of Bankruptcy Procedure, Relief from Judgment or Order, App. 48a.

STATEMENT

1. **The Bankruptcy Cases and the Miami Center Liquidating Trust.** – This petition for a writ of certiorari to the court of appeals is related to separate chapter 11

bankruptcy proceedings filed by each of the petitioners. On August 8, 1985, the bankruptcy court confirmed, without a hearing on confirmation, a plan of liquidation proposed by the Bank on behalf of the debtors, see *In re Holywell Corp.*, 54 B.R. 41 (Bkrtcy. S.D. Fla. 1985).

The bankruptcy court found that the Bank's secured "claim is undersecured and hopelessly in default," *Id.* at 42, and that the Bank faced a "substantial loss now,"[2] *Id.* at 43. Further, the bankruptcy judge concluded:

> I find that the Amended Plan [C.P. No. 478] filed March 26 by the Bank of New York as modified by the Second Amendment [C.P. No. 854] filed July 30[3] meets each of the requirements specified in 11 U.S.C. § 1129(a) and (b). The bank has invoked (C.P. No. 546) the cram down provisions of § 1129(b)(1). They are justified in this instance because the plan as amended does not discriminate unfairly and is fair and equitable with respect to each class of claims that is impaired under, and has not accepted, the bank's plan. *Id.* at 43.

The prior opinion of *this* Court, reported as *Holywell Corporation v. Smith*, 503 U.S. 47, 112 S.Ct. 1021 (1992), explains the provisions of the Bank's amended plan with

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[2] On March 20, 1985, relying on the provisions of certain releases, the bankruptcy court had entered a judgment determining the amount of the Bank's liens, see *infra* at 13, n.16. The bankruptcy court's judgment was entered without satisfying established principles of equity requiring an accounting or a reply in the Bank's pleadings against the petitioner MCLP's answer that the releases must be set aside for fraud and inadequacy of consideration, see Story, Eq. P. §§ 796, 797.

[3] The bankruptcy court likewise found that "[t]he bank's Second Amendment to its plan assures the funding necessary to pay the [impaired] claim [of the Miami Center Joint Venture] in the event my decision with respect to subordination is reversed," *Id.* at 43.

respect to the creation of the Miami Center Liquidating Trust ("liquidating trust")and the duties of the trustee appointed after confirmation under the plan's provisions, see 112 S.Ct. at 1024, and 1026.[4]

2. **The Conflicting Opinions of the Court of Appeals Concerning the Validity of the Bankruptcy Court's Order Confirming the Bank's Amended Plan.** – The bankruptcy court's order confirming the Bank's amended plan was the subject of two separately filed appeals. Holywell appealed the bankruptcy court's order approving a "modified form of substantive consolidation proposed by the plan," 54 B.R. at 43, on the grounds that (a) the court lacked statutory authority for the substantive consolidation of the separate estates of Holywell and MCLP, and (b) the impermissible use of Holywell's cash to pay claims against another debtor's (MCLP's) estate, see 26 U.S.C. § 311.

The debtors also objected to the bankruptcy court's order confirming the Bank's amended plan, on several additional grounds: (1) the bankruptcy court failed to hold a hearing on confirmation of the Bank's amended plan in accordance with the requirements of 11 U.S.C. § 1128(a), and it also approved *ex parte* various material

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[4] Under Article IV of the confirmed plan, *Means For Execution of the Plan*, the trustee was required to purchase certain personal property leased to MCLP by a separate entity, the Miami Center Joint Venture ("MCJV") with the liquidating trust's cash prior to the payment of the unsecured claims of other creditors against MCLP's estate, p. 18; see *In re Holywell Corp.*, 874 F.2d 780, 781 (11th Cir. 1989) ["The plan required the liquidating trustee to take any action necessary, including the exercise of the purchase options in the FF&E leases, to obtain title to the FF&E so that the trustee could convey title to the FF&E to the purchaser at the closing."]. The trustee, however, did not pay MCJV for the purchase of its leased property in accordance with the plan's requirements; see *infra* at 16, n.18.

amendments to the plan, without satisfying the requirements of 11 U.S.C. § 1127(a);[5] (2) the plan's subordination of the valid claims of affiliated creditors as insiders did not comply with the requirements of 11 U.S.C. § 1122, see § 1129(a)(1);[6] (3) the elimination of the claims of Chopin for ground rent, which had a recorded priority superior to the Bank's liens, (4) the elimination of any provision for repayment of certain super-priority loans, previously specifically authorized by the bankruptcy court,[7] (5) the taking of the property of Holywell's non-debtor subsidiaries without paying any consideration, under the plan's substantive consolidation provision, in violation of the Constitution's Fifth Amendment;[8] (6) the fact that the Bank was not a "good faith purchaser"; (7) the Miami Center's appraised fair market value, used to determine the Bank's nominee's purchase price, including the leased property of entities other than the estate of the Bank's borrower MCLP, was at least $275 million, or $19.4 million higher than the Miami Center's purchase price under the provisions of the Bank's plan; and (8) the Bank's plan

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[5] See *Protective Committee for Indep. Stockholders of TMT v. Anderson*, 390 U.S. 414, 434-435 (1968), citing *National Surety Co. v. Coriell*, 289 U.S. 426, 436 (1933) [a confirmation order should be reversed in its entirety if the procedural requirements for a court's exercise of the statutory authority to confirm a plan have not been satisfied].

[6] See, *infra* at 9.

[7] The original presiding bankruptcy judge held, on April 1, 1987, that "the substantive consolidation of the five estates, provided in the plan, did not extinguish any of the post-petition claims presently under consideration. . . . I would not have confirmed a plan nullifying the 1985 orders that are at issue here." [C.P. No. 1573]

[8] The actual cost of the leased property taken without consideration was $8,477,405.

further provided for the Trustee's dismissal of a separate lawsuit brought by the Debtors against the Bank, alleging breach of contract, usury, fraud, and violation of Section 1962 of Title 18, *Crimes and Criminal Procedure.*

MCJV, a partnership consisting of the debtor Theodore B. Gould and an unrelated party, Olympia & York Florida Equity Corporation, also appealed the bankruptcy court's order confirming the Bank's amended plan, on the grounds that: the Bank's amended plan failed to satisfy (1) the Absolute Priority rule, which required the payment of MCJV's claim for unpaid rent and late charges from the Miami Center's sale proceeds prior to the distribution of such funds to the Bank,[9] and (2) the Indubitable Equivalent standard expressed in the Adequate Protection requirements of 11 U.S.C. § 361(3) with respect to the property of entities other than the debtor's estate.

On June 29, 1987, the court of appeals held, in *Miami Center Limited Partnership v. Bank of New York*, 820 F.2d 376, 379 (11th Cir. 1987), that "[t]he proper standard to apply in this case is whether the reorganization plan has been so substantially consummated that effective relief is no longer available." The panel concluded that effective relief could not be granted for the defects in the Bank's plan, because the Trustee had caused[10] the plan's

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[9] H. R. 95-595, 95th Cong. 1st Sess. 413-418 (1977) [if a creditor is impaired, then it must be paid in full before a junior creditor "may receive anything under the plan"]; also *Northern Pacific Railway v. Boyd*, 228 U.S. 482, 504 (1912); and *Norwest Bank Worthington v. Ahlers*, 108 S.Ct. 963, 966 (1988) ["[u]nder current law, no chapter 11 reorganization plan can be confirmed over the creditor's legitimate objections (absent cram down) if it fails to comply with the absolute priority rule"].

[10] The testimony of witnesses is undisputed that the trustee sought an indemnification holding him personally harmless for his actions under the provisions of the Bank's plan and, that

substantial consummation under 11 U.S.C. § 1101(2)[11] and "the Bank . . . has complied with all of its obligations under the reorganization plan," 820 F.2d at 380.

On March 10, 1988, the same panel held, in relevant part:

> The mootness standard is preserved in the present bankruptcy code at 11 U.S.C. § 363(m), but this provision applies only to the sale of the debtor's property by the trustee pursuant to § 363(b) or (c). *Section 363(m) does not apply where the debtor's assets have been sold, as here, by a liquidating trustee pursuant to a plan of liquidation* . . . . With respect to the purpose of the mootness rule, [this] court [has] held:
>
> > This rule of law [lack of power in the court to rescind sale where there has been no stay] was intended to provide finality to orders of bankruptcy courts and to protect the integrity of the judicial sale process upon which good faith purchasers relied.
>
> It is settled law in this circuit that when the debtor fails to obtain a stay pending appeal of the bankruptcy court's or the district court's

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after the Bank agreed to indemnify him, he conspired with the Bank to cause the dismissal as moot of the debtors' appeal of the order confirming the Bank's amended plan; *infra* at 26, n.23.

[11] The court of appeals found that "[t]he trustee has conveyed the project, worth over $250 million, to a good faith purchaser pursuant to the reorganization plan. With the exception of debtor-affiliated creditors, *the trustee has paid the undisputed claims of all creditors and reserved funds to pay the disputed* claims of the remaining creditors. Effective relief is therefore impossible. See *In re Information Dialogues, Inc.*, 662 F.2d [475] at 476 [8th Cir. 1981] (effective relief impossible where all undisputed creditor claims have been paid and funds reserved for all disputed creditor claims)." [Emphasis added] 820 F.2d at 830.

> order setting aside an automatic stay and allowing a creditor to foreclose on property, the subsequent foreclosure[12] and sale of the property renders moot any appeal. *Markstein v. Massey Associates*, 763 F.2d 1325 (11th Cir. 1985); *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir. 1984). This rule of law, which is premised upon considerations of finality, protection of the integrity of the foreclosure sale process, and the court's inability to rescind the sale and grant relief on appeal even if the purchaser of the property is a party to the appeal, is fully applicable to this case. Accordingly, the appeal must be dismissed as moot. (Note omitted). (Emphasis added)

Miami Center Limited Partnership v. Bank of New York, 838 F.2d 1547, 1553 (11th Cir. 1988), *cert. denied* 488 U.S. 823 (1988).

The panel's conclusions were based on granting deference under the clearly erroneous standard to the bankruptcy judge's adoption *in toto* of the proposed findings of fact submitted by the Bank after remand, 838 F.2d at 1551, n. 4, and his conclusion that the Bank was a good faith purchaser, because "[t]he 'good faith purchaser' is one who buys in good faith, that is, free of any fraud or misconduct and for value and without knowledge of any adverse claim. . . . " 838 F.2d at 1554. Thus, the appeals panel held:

> The bankruptcy court did not err in finding, and the district court did not err in affirming, that the plan had been substantially consummated and that its fairness, feasibility, and propriety

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[12] There was *no* foreclosure in this case, according to the provisions of the Bank's plan.

> had been verified,[13]. . . . The district court was required to dismiss the appeal as moot. *Id.*

On October 2, 1990, a different panel of the same court of appeals entered an opinion affirming a different district judge's *reversal* of the bankruptcy court's order confirming the Bank's amended plan, on the grounds that the plan did not comply with sections 1122, 1123, and 1129 of title 11. That panel held, in relevant part:

> At issue in this appeal is whether the Bank's plan complies with the applicable provisions of title 11, namely section 1122. *See* 11 U.S.C. § 1129(a)(1) (requiring that the plan comply with the provisions of title 11). Also at issue is whether the Bank's plan discriminates unfairly with respect to MCJV, a creditor who is impaired under, and who has not accepted the plan. *See* 11 U.S.C. § 1129(b)(1) (requiring that the plan not discriminate unfairly with respect to classes of impaired claims).
>
> The Bank argues that the fact that debtor Gould would benefit from payment of claim 502 by virtue of his interest in MCJV and the fact that MCJV could look to Gould's equity interest in MCJV and in MCJV's property to satisfy claim 502 justify its separate classification under section 1122. We disagree. . . .
>
> If the plan unfairly creates too many or too few classes, if the classifications are designed to manipulate class voting, or *if the classification scheme violates basic priority rights, the plan cannot be confirmed.* (Emphasis added)

In re Holywell Corp., 913 F.2d 873, 879-80 (11th Cir. 1990).

The panel also held, "[w]e also agree that the fact that claim 502 is in part an equity interest does not justify

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[13] Compare, *infra* at 10 [The Bank's plan was not fair]; also at 19 [The Bank's representations concerning the plan's feasibility were "materially false."]

its subordination. . . . The facts in this case thus do not warrant separate classification under section 1122. . . . The facts in this case similarly do not warrant equitable subordination of claim 502 under 11 U.S.C. § 510(c)." *Id.* Thus, the cram-down provision of the Bank's plan did not satisfy the Absolute Priority rule, namely 11 U.S.C. § 1129(a)(9)(B)(ii); compare *supra* at 3, quoting 54 B.R. at 43.

3. **This Court's *Holywell* Opinion.** – On February 25, 1992, this Court held, in relevant part:

> The Internal Revenue Code ties the duty to pay federal income taxes to the duty to make an income tax return. See 26 U.S.C. § 6151(a) ("when a return of a tax is required . . . the person required to make such return shall . . . pay such tax"). We conclude in this case that the trustee must pay the tax due on the income attributable to the corporate debtors' property because § 6012(b)(3) requires him to make a return as the "assignee" of the "property . . . of a corporation." We further hold that the trustee must pay the tax due on the income attributable to the individual debtor's property because § 6012(b)(4) requires him to make a return as the "fiduciary" of a "trust." 112 S.Ct. at 1024.

This Court also concluded that "the Miami Center Liquidating Trust is a 'trust' and that respondent Smith is its 'fiduciary,' " and, quoting a Treasury Regulation, 26 CFR § 301.7701-4(d)(1991), "[t]he Miami Center Liquidating Trust clearly fits this description [of a liquidating trust]." *Id.*

Furthermore, this Court's opinion held, in relevant part:

> *Even if § 1141(a) binds creditors of the corporate and individual debtors with respect to claims that arose before confirmation, we do not see how it can bind the United States or any other creditor with respect*

> *to postconfirmation claims.* Cf. 11 U.S.C. § 101(10) (1988 ed., Supp. II) (defining "creditor" as used in § 1141(a) as an entity with various kinds of pre-confirmation claims). (Emphasis added) *Id.* at 1028.

The issue which was before this Court on certiorari to the court of appeals was "whether the liquidating trustee breached his duty either under the terms of the Plan or other statutory provisions," *In re Holywell Corp.*, 911 F.2d 1539, 1546 (11th Cir. 1990). Circuit Judge Cox's dissent had stated that the Bank's plan required "the liquidating trustee not only to liquidate the . . . [Trust's] property but also to manage the property in 'all other ways as would be lawful for any person owning the same to deal therewith' . . . , Article V, paragraph 3." 911 F.2d at 1547. The plurality, however, held "that neither the provisions of the Plan nor the statutory provisions obligate the liquidating trustee to file income tax returns or pay taxes," *Id.* at 1546. This Court reversed unanimously.

4. **These Proceedings.** – After the court of appeals entered its first mootness ruling on June 29, 1987, the petitioners filed in the State court a complaint and request for jury trial against Fred Stanton Smith, individually and as trustee of the Miami Center Liquidating Trust, and also against the Bank. The complaint was filed in State court on the ground that the liquidating trust was a separate trust, distinct from a bankruptcy estate. See 112 S.Ct. at 1026. The complaint alleged four common law causes of action: negligence by Smith; breach of fiduciary duty by Smith; breach of contract against the trustee and the Bank; and conversion by the Bank. Further, the complaint sought as equitable relief Smith's removal as the liquidating trust's trustee.

The following undisputed facts were shown to prove the causes of action: (1) the trustee commingled the funds

of separate estates and did not provide a proper accounting segregating the assets and liabilities attributable to the property of the various estates originally placed in his fiduciary custody, App. 28a, n.2; (2) the trustee failed to establish a reserve for the payment of unpaid income taxes attributable to the sale of the "Washington Properties;"[14] (3) the trustee failed to repay $4,981,344 for certain specifically authorized super-priority loans, as of October 10, 1985, see *supra* at 5, n.7; (4) the trustee failed to pay $4,741,736 in administrative expenses, including rent on leased property owed to affiliated creditors, in accordance with 11 U.S.C. § 507(a)(1); (5) the trustee failed to establish a reserve, compare *supra* at 7, n.11, or pay $7,338,152 for MCJV's preconfirmation claim for rent and late charges from the Miami Center's sale proceeds, in accordance with its recorded superior priority over the claims of the Bank and of MCLP's unsecured creditors;[15]

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[14] The bankruptcy court's Cash Collateral Order, entered on December 31, 1984, [C.P. No. 303] on the Bank's motion, required the determination and payment of income taxes attributable to the sale of the Washington Properties. In response to various lawsuits filed by the petitioners, alleging that the trustee's failure to establish a reserve for the payment of federal and state income taxes on behalf of the estates of the separate taxable entities in his fiduciary custody, see *infra* at 16, n.18, was negligence and a breach of fiduciary duty, the trustee filed in the bankruptcy court, on December 27, 1987, an Adversary Complaint for Declaratory Relief against the United States of America, *et al.* Adv. No. 87-0627. The Complaint alleged that "9. [n]o provision was made in either the Plan or the Order authorizing the Trust to use the Washington Proceeds for payment of income taxes on any gain realized . . . from the sale of the Washington and Miami Center properties."

[15] In *Bank of New York v. Olympia & York Florida Equity Corp., Theodore B. Gould, and Miami Center Joint Venture*, No. 85-3430-Civ-CCA (S.D. Fla., June 23, 1986), the district court found that "[t]he Bank filed UCC-1 forms reflecting and recording priority

(6) the trustee failed to pay $5,300,000 in ground rent to Chopin, in accordance with its recorded superior priority over the Bank's mortgages; (7) the trustee acquiesced in the Bank's action establishing an escrow of funds derived from the Miami Center's sale proceeds to provide for disputed real estate taxes, instead of paying such taxes under protest, which action has damaged the trust estate in the amount of $3,107,950; and (8) the trustee failed to pay a claim of the United States in accordance with its statutory priority, namely § 507(a)(7), and did not institute a suit against the Bank to recover MCLP's employment payroll taxes, plus $1,100,000 in penalties and interest, which were ultimately paid by the Miami Center Liquidating Trust.

The complaint also alleged as facts that (9) the Bank had delayed settlement of the closing adjustments related to the Miami Center's sale, which were to be consummated within forty-five (45) days; (10) it failed to provide an accounting of the loan amount and accrued interest payable under the loan documents;[16] (11) it failed to reimburse the trust for the disbursement of $1,139,015 authorized by the bankruptcy court to complete construction following the controlling appraisal of the property, in

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rights of MCJV as owner. Such rights were superior to those of the Bank as well as to general and unsecured creditors"; *affirmed* No. 86-5609 (11th Cir., October 12, 1988).

[16] The trustee's audit and examination of the Bank's interest charges found that the Bank had overcharged interest at the Miami Center's closing, in the amount of at least $13,130,082.27; see 838 F.2d at 1555. Nevertheless, because the trustee had caused the substantial consummation of the Bank's plan, the Eleventh Circuit affirmed the district court's opinion dismissing an appeal as moot on the grounds that the Miami Center mootness doctrine precluded effective judicial relief. *In re Holywell Corp.*, 901 F.2d 931, 934 (11th Cir.), *cert. denied* 111 S.Ct. 713 (1991).

accordance with 11 U.S.C. § 506(c); (12) it failed to pay the Trust $1,305,529 as a closing adjustment for the actual cost of stored materials; and (13) it took as a credit against the Miami Center's purchase price $27,050,115 in interest accrued post-petition on its undersecured claim, see *supra* at 3.[17]

On July 2, 1989, the court of appeals affirmed, without oral argument, an order adopting the report and recommendation by the bankruptcy judge on a petition for removal to the bankruptcy court of the complaint filed in State court, on the ground that it was a core proceeding in accordance with 28 U.S.C. § 1452, App. 44a. The court of appeals also affirmed the district court's opinion, cited as *In re Holywell Corp.*, 93 B.R. 780 (S.D. Fla. 1988), which upheld the lawsuit's dismissal on the grounds that "[t]he

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[17] In response to this complaint, the trustee filed, on October 28, 1987, a complaint for breach of contract and declaratory relief against the Bank and the petitioners, which alleged, *inter alia*, that "Smith takes the position, as does the Bank of New York, that the Bank of New York was *not* an undersecured creditor, and that it was entitled to receive credit against the purchase price at the closing for postpetition interest." The bankruptcy judge to whom the proceedings had been transferred after the recusal of the initial judge for personal bias against Mr. Gould, revised the Confirmation Order's findings and held that "[t]he Bank was not an undersecured creditor in these reorganization proceedings." The district court vacated the bankruptcy court's judgment. Nevertheless, district judge Aronovitz held that the *Miami Center* mootness ruling:

> . . . makes it crystal clear that it is no longer appropriate for the bankruptcy court to re-visit the substantive merits of the confirmed Plan. 838 F.2d at 1555. Consequently, the question of whether BONY was "entitled" to obtain the $27 million credit is no longer subject to adjudication. *In re Holywell Corp.*, No. 88-0151-Civ (S.D. Fla., July 21, 1988), *appeal dismissed*, 923 F.2d 865 (11th Cir.), *cert. denied*, 111 S.Ct. 2259 (1991).

allegations of misconduct refer not to 'the field left to [the trustee's] discretion' but rather to duties that were required by the Confirmed Plan. . . . The question is . . . whether the duties required by the Plan were controlling. . . . The provisions of a confirmed plan bind all parties whose rights are affected by the plan, regardless of whether they voted to accept it. *Id.* at 783; compare *supra* at 11, quoting 112 S.Ct. at 1028.

The district court had held, *inter alia*, that the petitioner ". . . [is] barred by both *res judicata* and collateral estoppel from relitigating [the following] . . . issues," *Id.*:

> [T]he failure to establish a reserve for the payment of income taxes [because] [t]he Bankruptcy Court held that the Trustee was not responsible for the filing of federal income tax returns on behalf of the Debtors or liable to the United States for the payment of any federal income taxes. . . . " 93 B.R. at 784; App. 20a.
>
> [T]he failure to pay claims of affiliated creditors [because] [t]he treatment of the claims of affiliates of the Debtors is governed by the Plan which provides for the subordinate classification of these claims. The plan also provided a mechanism for the determination and payment of the MCJV claim. . . . *Id.*
>
> The Bankruptcy Court Has Subject Matter Jurisdiction Over This Action . . . [because] the claims set forth in the complaint were "core matters" under 28 U.S.C. § 157 and . . . the Bankruptcy Court had authority to hear and determine the claims. . . . *Id.* at 785; App. 21a.

On April 2, 1993, one month after the proceedings, which the court of appeals had remanded to the district court for hearings in conformity with this Court's *Holywell* opinion, were remanded to the bankruptcy judge, the petitioners filed a Rule 60(b)(5) motion for relief from the bankruptcy court's order dismissing the

complaint which had alleged negligence, breach of fiduciary duty, breach of contract, and conversion, App. 26a. The bankruptcy court denied the motion on April 30, 1993, without explanation, App. 9a.

The district court affirmed, without oral argument, and held, in relevant part:

> The Supreme Court decision was limited to the issue of the Trustee's responsibility to file tax returns and pay federal taxes. The Court held that the failure of a plan of reorganization to provide for the taxes did not bind federal tax authorities. This decision does not affect the issues raised in the Complaint. App. 5a.
>
> In the 1987 Complaint at issue, the Debtors/Appellants alleged seven claims involving alleged breaches of duty and other wrongs by the Trustee and the Bank. However, only one of the seven claims related to the Supreme Court's decision and the Trustee's income tax liability. [Footnote omitted] The other six matters have already been addressed and final judgments have been entered in favor of the Bank and Trustee . . . , App. 6a; compare *supra* at 12.

The district court concluded that "[t]he Supreme Court's tax decision has not changed the result of the debtors' prior unsuccessful attacks on the Trustee,"[18]

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[18] On September 30, 1993, the bankruptcy court denied the counterclaims of the petitioners against the trustee in the proceedings remanded from the court of appeals to the district court for hearings in conformity with this Court's *Holywell* opinion, *Holywell Corporation, et al. v. Smith, et al.*, 965 F.2d 994 (11th Cir. 1992). The counterclaims alleged gross negligence, breach of fiduciary duty, and conspiracy. The bankruptcy judge's findings of fact and conclusions of law, which were drafted by the

App. 6a. The court's order did not refer to the opinion of the court of appeals, upon which the petitioners' Rule

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trustee's attorney and adopted verbatim, relied on the doctrine of *res judicata* and collateral estoppel, and held, in relevant part:

> These counterclaims and cross-claims are not the first time such allegations have been made against the Trustee, individually and as Trustee, and against the bank. The debtors unsuccessfully sued Mr. Smith and the bank for, *inter alia*, failing to establish reserves for taxes. *In re Holywell*, 93 B.R. 780 (S.D. Fla. 1988). They also caused four of Holywell's subsidiaries to sue Mr. Smith and the bank in Virginia for, *inter alia*, his handling of the tax issues. These cases were each dismissed. *See, e.g., Twin Development Corp. v. Smith*, No. 87-0037C, slip op. (W.D. Va. Nov. 15, 1988). . . .
>
> There was no credible evidence which showed the Trustee knew or, under the circumstances, should have known that he was responsible for the taxes prior to the Supreme Court's ruling.
>
> The debtors have failed to demonstrate any breach of fiduciary duty by the Trustee. In a related proceeding in which the debtors sought damages against the Trustee and the bank for, *inter alia*, the failure to establish reserves for taxes, the district court held that the Trustee does not owe the debtors ordinary common law fiduciary duties, but only those duties defined by the confirmed plan. *See In re Holywell*, 93 B.R. 780, 783 (S.D. Fla. 1988), aff'd, no. 88-6187 (11th Cir. July 7, 1989) (p. 10). . . .

The bankruptcy court also relied on the doctrine of derived judicial immunity on the grounds that the trustee was an "arm of the court." The district court's affirmance on January 20, 1995, is the subject of a pending appeal to the Eleventh Circuit, and a related petition for writ of mandamus has been filed in this Court concerning the lower court's conclusion "that the Bankruptcy Court had subject matter jurisdiction over the Debtors' counterclaims and cross-claims pursuant to 11 U.S.C. § 505(a), 28 U.S.C. § 157(b)(2)(A), and § 157(b)(2)(O)." *Holywell Corporation and Theodore B. Gould v. Smith*, No. 94-0111-Civ-SMA, January 20, 1995, p. 18; *infra* at 20, n.21.

60(b)(5) motion also relied, that held that the Bank's plan failed to comply with the requirements of 11 U.S.C. § 1129(a)(1), namely section 1122, and wrongfully impaired MCJV's claim for unpaid rents in violation of 11 U.S.C. § 1129(b)(1), 913 F.2d at 880; also *supra* at 12.[19]

On September 24, 1993, the bankruptcy court held the Bank liable for negligent misrepresentation as the plan's proponent, *Smith v. Bank of New York*, 161 B.R. 302 (Bkrtcy. S.D. Fla. 1993), and concluded, in relevant part:

> . . . there is no dispute that the bank failed to include any analysis of the tax consequences of the proposed reorganization scheme in its disclosure statement or any provision for payment of taxes in its plan. The law requires an analysis of the tax consequences and provision for payment. [Citations omitted] The failure to do so is

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[19] On March 9, 1994, the bankruptcy court adopted verbatim findings of fact and conclusions of law proposed by the Bank which authorized the issuance of a Trustee's Certificate payable to the Bank for reimbursement of the payment in the amount of $22,335,882 made by M C Holdings Partners to MCJV on March 18, 1991, *Bank of New York v. Smith, et al.*, Adv. No. 94-0014-BKC-PGH. The district court affirmed in part and reversed in part on February 16, 1995. The court concluded "[t]he record in this case does not support the conclusion that the bank's nominee paid anything for the FF&E at the time of closing. . . . If no value was ascribed to the FF&E, then the bank would be entitled to no credit on the Trustee's Certificate since it would not be paying twice for the FF&E," p. 4. The district court also held that "[i]t was within the discretion of the bankruptcy judge to award interest to the bank," notwithstanding the court's finding that "most of the interest was generated by the bank's unsuccessful appeals of the adverse ruling on [MCJV's] claim 502 . . . [and] a party should not be rewarded by receiving interest on a judgment which it has unsuccessfully appealed," *Holywell Corporation, et al. v. Bank of New York*, No. 94-0997-Civ. As of April 5, 1994, the accrued interest awarded to the Bank was $16,496,077.

> an omission of material fact. . . . [T]he bank's representations concerning the feasibility of the plan . . . were materially false. 161 B.R. at 307.

REASONS FOR GRANTING THE WRIT

This petition for writ of certiorari concerns the failure of the court of appeals to enforce Rule 60(b)(5) of the Federal Rules of Civil Procedure,[20] App. 48a, and to vacate judgments which have damaged "[t]he very essence of civil liberty [that] certainly consists of the right of every individual to claim the protection of the laws, whenever he receives injury," *Marbury v. Madison*, 1 Cranch 137, 163 (1803).

A trusteeship is a serious business and "[t]he most effective sanction for good administration is personal liability." *Mosser v. Darrow*, 341 U.S. 267, 274 (1951). "[T]here are ways by which a trustee may effectively protect himself against personal liability. The practice is well established by which trustees seek instructions from

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[20] In various decisions involving civil actions, this Court has held that a writ of mandamus may be properly issued to compel compliance by lower courts with the rules which it is this Court's obligation to formulate and put in force, see *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701, 706 (1927); *McCullough v. Cosgrave*, 309 U.S. 634 (1940); and *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957).

As this Court held in *City Bank of Fort Worth v. Hunter*, 152 U.S. 512, 515 (1893), citing *In re Washington & Georgetown Railroad*, 140 U.S. 92, 95 (1891): "[t]he question is merely as to the form of proceeding which this court should adopt to enforce the execution of its own mandate in the court below. The subject might, without doubt, be brought before us upon motion, and a mandamus issued to compel its execution. But appeal from the decision of the court below is equally convenient and suitable; and perhaps more so in some cases, as it gives the adverse party notice that the question will be brought before this Court. . . . "

the court, given upon notice to creditors and interested parties, as to matters which involve difficult questions of judgment," *Id.*

It has already been established in the previous proceedings before this Court[21] that, instead of seeking the bankruptcy court's instructions concerning the defects of the Bank's plan with notice to interested parties, the trustee sought the Bank's indemnification to hold himself personally harmless for his actions under the plan's provisions and commenced distribution to cause substantial consummation of the Bank's plan for the purpose of precluding effective judicial relief; *infra* at 26, n.23.

1. The Violence Done To the Administration of Justice

(a) Fed.R.Civ.Pro.R. 60(b)(5). – The court of appeals' affirmance of the district court's opinion is contrary to the plain meaning of the Prior Judgment clause of Rule 60(b)(5) and the standard adopted by this Court and the various courts of appeal for its application.

In *Butler v. Eaton*, 141 U.S. 240 (1891), a case which concerned an action by a receiver for a bank to recover an alleged liability related to a capital contribution for the

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[21] Mandamus has been requested to determine, *inter alia*, the meaning of the mandate of this Court's *Holywell* opinion, with respect to a bankruptcy judge's authority to hear as core proceedings under 28 U.S.C. § 157 causes of action cognizable only under state law, alleging negligence and breach of fiduciary duty against a court-appointed trustee, who has failed to act with undivided loyalty to the beneficiary of a separate trust which is distinct from a bankruptcy estate and to manage the property in his fiduciary custody in accordance with statutory obligations. See 28 U.S.C. § 959(b). The mandamus petition also sought to determine the authority of the lower courts to reexamine the question of whether the trustee breached his fiduciary duty under the terms of the Bank's plan and statutory provisions, *supra* at 11, quoting 911 F.2d at 1546.

purchase of a bank's stock, a lower federal court's judgment had been based on granting comity to a judgment by a state court, and when both the state and federal judgment came before this Court, the judgment of the state court was reversed. Accordingly, the federal judgment was also reversed:

> It is apparent from the inspection of the record that the whole foundation of that part of the judgment which is in favor of the defendant is, to our judicial knowledge, without any validity, force or effect, and ought never to have existed. Why then, should not we reverse the judgment which we know of record has become erroneous. 141 U.S. at 243-44.

"[T]he 'prior judgment' clause is limited to cases in which the present judgment is based on the prior judgment in the sense of *res judicata* or collateral estoppel. It does not apply when . . . the prior judgment has been relied on merely as precedent." *Marshall v. Board of Ed., Bergenfield, N.J.*, 575 F.2d 417 (3rd Cir. 1978), citing 7 *Moore's Federal Practice* at 60-248, which states:

> It should be noted that while 60(b)(5) authorizes relief from a judgment on the ground that a prior judgment has been reversed or vacated, it does not authorize relief from a judgment on the ground that the law applied by the court in making its adjudication has been subsequently overruled or declared erroneous in another and unrelated proceeding.

In *Michigan Surety Co. v. Service Machinery Corp.*, 277 F.2d 531 (5th Cir. 1960), the Fifth Circuit Court of Appeals held, in relevant part:

> Rule 60(b) is to be liberally construed and applied to carry out the purpose of avoiding, where relief is promptly sought and no prejudice is shown, the enforcement of a judgment which has become erroneous even though it

> may have been proper when entered. 277 F.2d at 533.[22]

These opinions are consistent with Professor Moore's analysis of the second provision of Rule 60(b)(5) which states:

> Where a judgment is based on a prior judgment . . . [i]f the judgment in the first case is reversed and the basis for the judgment in the second case is thus removed, then the appellate court should also reverse the second judgment. *7 Moore's Federal Practice*, 60-246.

This petition for writ of certiorari concerns a judgment directly based on prior judgments which have been reversed. The second judgment held that "[t]he Appellants are barred by both *res judicata* and collateral estoppel from relitigating these issues in this action," 93 B.R. at 783. The district court specifically held that *res judicata* and collateral estoppel precluded relitigating the question of whether the trustee's failure to establish a reserve for the payment of income taxes prior to the commencement of distribution to creditors with a priority subordinate to the United States was negligence and breach of fiduciary duty because "[t]he Bankruptcy Court held that the Trustee was not responsible for the filing of federal income tax returns on behalf of the Debtors or liable to the United States for the payment of any federal income taxes," 93 B.R. at 784.

This Court's *Holywell* opinion, however, reversed the affirmance of the bankruptcy court's judgment upon which the district court's second judgment relied.

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[22] See also *Tomlin v. McDaniel*, 865 F.2d 209, 210 (9th Cir. 1989); *Title v. United States*, 263 F.2d 28, 31 (9th Cir.), *cert. denied*, 359 U.S. 989, 79 S.Ct. 1118, 3 L.Ed. 2d 978 (1959).

The district court had also concluded that *res judicata* and collateral estoppel barred relitigating issues concerning the trustee's failure to pay the valid claims of insiders in accordance with contractual and statutory priority because "[t]he treatment of the claims of affiliates of the Debtors is governed by the Plan which provides for the subordinate classification of these claims [and] [t]he plan also provided a mechanism for the determination and payment of the MCJV claim," *Id.*

The court of appeals, however, affirmed the reversal of the bankruptcy court's order confirming the Bank's amended plan and held that the plan's classification structure did not comply with the requirements of 11 U.S.C. § 1122, *supra* at 9, quoting 913 F.2d at 880. As the court of appeals ruled, the Bank had the burden of presenting material evidence of unfair conduct to subordinate the valid claims of insiders under the plan's provisions in accordance with the requirements of 11 U.S.C. § 510(c), 913 F.2d at 880, and the Bank failed to demonstrate, as the plan's proponent, that equitable subordination of the claims of insiders was warranted, *Id.*

(b) Although the maximum time is one year for a Rule 60(b) motion filed under subsections (1)-(3), if a motion for relief is filed for reasons (4), (5), and (6), the applicable standard is a "reasonable time," and whether a trial court's decision denying such a motion was an abuse of discretion, or legal error, must be determined in light of the facts and circumstances. See *United States v. Karahalias*, 205 F.2d 331, 333 (2nd Cir. 1953); also *Tozer v. Charles A. Krause Milling Co.*, 189 F.2d 242, 245 (3rd Cir. 1951).

The inherent injustice of allowing a reversed order to continue to have prospective effect as precedent and as the "law of the case" precludes limiting Rule 60(b)(5) to the narrow reading given to other motions for relief from

a judgment under Rule 60(b), 7 *Moore's Federal Practice*, 60-243. Many of the strict timing and procedural requirements that apply to motions for relief from judgment under subsections (1)-(4) and (6) are inapplicable to a Rule 60(b)(5) motion:

> Due to the grounds for relief under clause (5) what constitutes a reasonable time must vary greatly with circumstances of the case, and the movant should be given ample time under all circumstances to make his motion. . . . [W]here relief is sought from a judgment on the ground that it is no longer equitable that the judgment have prospective application, the mere lapse of time in and of itself does not preclude relief. 7 *Moore's Federal Practice* at 60-318.

Where movants seek relief from a reversed judgment, the courts have liberally applied the "reasonable time" requirement.

In *United States v. Holtzman*, 762 F.2d 720, 725 (9th Cir. 1985), the Ninth Circuit Court of Appeals held that the determination of "[w]hat constitutes a 'reasonable time' depends on the facts of each case;" see, also, *Cachoian v. United States*, 452 F.2d 548 (5th Cir. 1971), citing *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532 (1969). In the present case, the district court relied on a local bankruptcy rule, which required that "a motion, application or other pleading in or in connection with a bankruptcy case or proceeding . . . shall be filed within ten days after the event that precipitated the pleading," App. 7a, to conclude that the petitioners did not file their Rule 60(b)(5) motion "within a reasonable time."

2. The *Miami Center* Mootness Ruling Has Wrongfully Been Relied Upon To Unjustly Enrich The Bank of New York And To Protect The Trustee From Personal Liability.

During the earlier proceedings before this Court, the following pertinent colloquy occurred:

QUESTION: I take it many plans have been undone because perhaps there was a superior lien that was not acknowledged at the time the plan was executed.

MR. STETTIN: Clearly, there are methods by which a plan can be undone. . . . This plan has been substantially consummated. . . .

QUESTION: [S]upposing they [the Government] had acted with due diligence, what would have happened?

MR. STETTIN: The plan would not have been confirmable because one of the requirements under section 1129 [(a)(11)] is that the plan be shown to be capable of successfully being carried out. . . .

QUESTION: Why didn't the trustee recognize the defect? He was entitled to employ a counsel. I think he spent a lot of money on counsel. . . .

MR. STETTIN: . . . The trustee found himself when he took effect on October 10, 1985, with an absolute requirement. Section 1142(a) of the bankruptcy code says that the person charged with carrying out the terms of the plan . . . shall carry out the terms of the plan and must obey the orders of the court. . . .

QUESTION: [D]id the trustee violate any term of the plan when he initiated this litigation?

MR. STETTIN: No.

QUESTION: Would he have lawfully initiated this litigation the day after he was appointed?

MR. STETTIN: He could have legally done that, except that it would not have allowed him to carry out

the terms of the plan within the time required under the terms of the plan.

QUESTION: Well, he's not going to be able to do that anyway.

U. S. Supreme Court, Transcript, December 4, 1991, pp. 20-24.

It is undisputed that the trustee was aware of the defects of the Bank's plan and after "the bank agreed to indemnify the Trustee for any liability incurred as a result of implementation of the plan, including tax obligations imposed by law upon the Trustee," 161 B.R. at 305, the trustee conspired with the Bank to cause the dismissal as moot of the debtors' appeal of the bankruptcy court's order confirming the Bank's amended plan.[23]

As a result of the trustee's actions causing the plan's substantial consummation, the court of appeals concluded in a related proceeding that the Bank was entitled to overcharge interest, in an amount exceeding $13,130,082, because "[i]t might be true that the notes called for a lower interest rate than that accepted by the bankruptcy court. . . . [Nevertheless] [t]he amount of interest . . . was included in the Bank's bargain for the purchase of the project." *In re Holywell Corp.*, 901 F.2d at 934. Further, it is undisputed that only the Bank benefited from the plan's substantive consolidation provision, *supra* at 5.

The failure of the court of appeals to conclude that it was no longer equitable for its *Miami Center* mootness rulings to have prospective application, for the purpose

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[23] The undisputed testimony of the trustee's former attorney was that "we decided that one of the ways to facilitate . . . consummation would be to make a payment to the Class 6 [unsecured] creditors. The purpose would be to create the arguments of mootness." [Bkrtcy. S.D. Fla., Transcript, January 19, 1992, p. 475.]

of construing the Bank's amended plan as binding under 11 U.S.C. § 1141(a) in order to protect the trustee from personal liability for breach of fiduciary duty and to unjustly enrich the Bank as the plan's proponent, is contrary to the principles of equity, common law, and the law of trusts. See, *Oliver v. City of Shattuck*, 157 F.2d 150 (10th Cir. 1946),[24] citing *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 248 (1944).

In *Hedges v. Dixon County*, 50 U.S. 182 (1893), this Court held that "whenever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation," and it is settled that "whatever equitable power remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code," *Norwest Bank Worthington v. Ahlers*, 108 S.Ct. 963, 968 (1988). "[T]he fact that a proceeding is equitable does not give the judge a free-floating discretion to redistribute rights in accordance with his personal views," *Matter of Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, 791 F.2d 524, 528 (7th Cir. 1986). "Substantive consolidation has no express statutory basis but is a product of judicial gloss," *In re Augie/Restivo Baking Co.*, 860 F.2d 515, 518 (2nd Cir. 1988).

The common law doctrine of assumpsit is that "if a man, by fraud, or wrong, or illegality, obtains, or exacts, or retains money justly belonging to another, with notice that the latter contests the right of the former to receive, or exact, or retain it, an action for money had and received lies to recover it," *Cary v. Curtis*, 44 U.S. 236, 255

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[24] The Tenth Circuit held that "the courts have never hesitated to grant equitable relief against a judgment, if to execute it would give the judgment creditor an unconscientious advantage procured through his own fraud." 157 F.2d at 153.

(1845) [Story, J. dissent (decided on other grounds)]. The finding of a constructive trust "is a trust relationship created 'by equity to prevent the unjust enrichment of one person at the expense of another as the result of fraud, undue influence, abuse of confidence or mistake in the transaction that originates the problem'." *In re General Coffee Co.*, 828 F.2d 699, 706 (11th Cir. 1987), quoting *Wadlington v. Edwards*, 92 So.2d 629, 631 (Fla. 1957).

This analysis of the law of fiduciaries and trusts is consistent with this Court's opinion that "[i]t is a well established principle of equity that a third party who pays money to a fiduciary for the benefit of the beneficiary, with knowledge that the fiduciary intends to misappropriate the money or otherwise be false to his trust, is a participant in the breach of trust and liable therefor to the beneficiary." *Seminole Nation v. United States*, 316 U.S. 286, 62 S.Ct. 1049, 1054 (1942).

In the present case, the court of appeals has conceded that there is no statutory authority for the *Miami Center* mootness doctrine, *supra* at 7, and concluded that its ruling "was intended to provide finality to orders of bankruptcy courts and to protect the integrity of the judicial sale process upon which good faith purchasers relied," 838 F.2d at 1553. However, the opinion of the court of appeals that the Bank's plan wrongfully subordinated MCJV's impaired claim, *supra* at 9, quoting 913 F.2d at 880 and the bankruptcy court's finding that the Bank's representations concerning the plan's feasibility were materially false, 161 B.R. at 307, preclude the conclusion that the Bank was a "good faith purchaser," *supra* at 8.

The applicable standard for these proceedings should have been that a "court nevertheless is not deprived of the authority, whenever in its opinion justice requires it, to deal with the rights of the parties as they stood at the commencement of the suit, and to compel the defendant

to undo what he has wrongfully done since that time, or to answer in damages," *Mills v. Green*, 159 U.S. 651, 654 (1895); see, also, *Ohio v. Madeline Marie Nursing Homes*, 694 F.2d 449, 463 (6th Cir. 1982) [inapplicability of mootness doctrine where disgorgement is available].

This petition's principal question is whether this Court will sanction the unjust enrichment of the Bank as the proponent of an unlawful court-approved plan and the failure of a court-appointed trustee to discharge his fiduciary duties, in reliance on the Bank's indemnification, holding him personally harmless for his actions, based on a mootness doctrine for which there is no constitutional or statutory authority.

In *King v. United States*, 379 U.S. 329, 85 S.Ct. 427, 432 (1964), this Court held that even after confirmation it is most unlikely that a trustee's objections to a plan's defects "would have been ignored. Had it been . . . we would be faced with a very different case." The present case concerns a trustee who failed to seek the court's instructions, with notice to interested parties, concerning the plan's defects, in reliance on the Bank's indemnification.

The affirmance by the court of appeals has ignored the mandate of this Court's *Holywell* opinion that the trustee breached his duty as a fiduciary under statutory provisions to pay the taxes attributable to the income derived from the property of the separate taxable entities in his custody within the prescribed time for such payment under 26 U.S.C. § 6151, 112 S.Ct. at 1024. The court of appeals also ignored its own opinion that the Bank's amended plan failed to comply with 11 U.S.C. § 1122, *supra* at 9, as stated in 913 F.2d at 880, precluding the conclusion that the Second Amendment's modification of

the Bank's plan complied with the plain meaning of 11 U.S.C. § 1127.[25]

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

Miami Center Limited Partnership,
Miami Center Corporation,
Chopin Associates, and
Holywell Corporation

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[25] In the proceedings concerning MCJV's appeal of the bankruptcy court's order confirming the Bank's amended plan, the district court found that "[n]o confirmation hearing was held on objections to the Bank's plan. Similarly, no hearing was held on the issues of subordination or classification. . . . [T]he court approved it [Second Amendment] without holding a hearing or requiring a new disclosure statement." *In re Holywell Corp.* (Miami Center Joint Venture v. Bank of New York), 85-3230-Civ-Atkins, June 30, 1986.

It is also undisputed that the trustee agreed to the Bank's modification after confirmation of the Funding Agreement which provided for the issuance of a Trustee's Certificate to the Bank under the plan's Second Amendment, compare *supra* at 18, n.19, after the Bank agreed to indemnify him, all without seeking the court's instructions with notice to interested parties. *Compare* 11 U.S.C. § 1127(b).

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-4626

Docket No. 93-942-CIV-KMM
Docket No. 87-546-BKC-SMW-A

HOLYWELL CORPORATION; MIAMI CENTER LIMITED PARTNERSHIP; MIAMI CENTER CORPORATION; CHOPIN ASSOCIATES; THEODORE B. GOULD,

Plaintiffs-Appellants.

versus

BANK OF NEW YORK; CITY NATIONAL BANK OF MIAMI; M. C. HOLDING[S] PARTNERS; FRED STANTON SMITH; ROBANK CORPORATION; H.D. LIQUIDATION INCORPORATED; ZENTAC INVESTMENTS INCORPORATION(SIC); BOTT FLORIDA HOLDING CORPORATION; AMERICAN SECURITY LIMITED; M CENTER CORPORATION,

Defendants-Appellees.

IN RE: MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, THEODORE B. GOULD, CHOPIN ASSOCIATES, HOLYWELL CORPORATION.

Debtors.

Appeal from the United States District Court
for the Southern District of Florida

(July 19, 1995)

BEFORE EDMONDSON, Circuit Judge, HILL, Senior Circuit Judge, and MILLS*, District Judge.

PER CURIAM:

AFFIRMED. See Eleventh Circuit Rule 36-1.

"Costs taxed against plaintiffs-appellants."

Judgment Entered: July 19, 1995
For the Court: Miguel J. Cortez, Clerk.

By: /S/ Karen McNabe

ISSUED AS MANDATE: 8/17/95

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* Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 93-942-CIV-MOORE

IN RE: HOLYWELL CORPORATION, et al.,

Debtors,

_____/

HOLYWELL CORPORATION, et al.,

Appellants,

vs.

THE BANK OF NEW YORK, et al.,

Appellees.

_____/

ORDER AFFIRMING BANKRUPTCY COURT

Holywell Corporation, Miami Center Corporation, Miami Center Limited Partnership and Chopin Associates ("Debtors/Appellants") appeal the April 30, 1993 Order of Bankruptcy Judge Sidney M. Weaver denying their "Rule 60(b) Motion for Relief" from a May 1988 Order of Dismissal.

THE COURT has considered the briefs and the pertinent portions of the record, and being otherwise fully advised in the premises, it enters the following Order.

BACKGROUND

The Debtors/Appellants developed the "Miami Center" office and hotel complex from 1979 to 1983 utilizing approximately $200 million in loans for construction of the facility. In June 1984, Appellee The Bank of New York ("Bank") commenced a state court foreclosure action; in August 1984, the Debtor/Appellants filed voluntary petitions in bankruptcy. The creditors approved and the bankruptcy court confirmed the Bank's plan of reorganization. *See In re Holywell Corp.*, 54 B.R. 41 (Bankr. S.D. Fla. 1985).

In October 1987, Debtors/Appellants filed a complaint in state court. Because the state court action amounted to a collateral attack on various aspects of the reorganization, the action was removed to federal bankruptcy court and docketed as Adversary Proceeding No. 87-0546-BKC-SMW-A. On May 12, 1988, the bankruptcy court dismissed the adversary complaint and United States District Court Judge Eugene P. Spellman affirmed the order of dismissal on October 31, 1988. *In re Holywell Corp.*, 93 B.R. 780 (S.D. Fla. 1988). The United States Court of Appeals for the Eleventh Circuit affirmed that order in an unpublished opinion dated July 7, 1989 and the United States Supreme Court denied certiorari. *See Miami Center v. Bank of New York*, 881 F.2d 1086 (11th Cir. 1989), *cert. denied*, 493 U.S. 1057, 110 S.Ct. 867, 107 L. Ed. 2d 951 (1990).

On April 2, 1993, Debtors/Appellants filed with the bankruptcy court a "Rule 60(b) Motion for Relief" from

the May 13, 1988 order of the bankruptcy court dismissing the complaint. Debtors/Appellants relied on a February 25, 1992 decision by the United States Supreme Court in *Holywell v. Smith*, 112 S.Ct. 1021, 117 L. Ed. 2d 196 (1992), which reversed three other lower court rulings and held that Fred Stanton Smith, the Trustee, was required to file certain income tax returns and pay those taxes. The Bank and the Trustee opposed the Motion for Relief and on April 30, 1993, the bankruptcy court denied the Motion for Relief. The instant appeal followed.

DISCUSSION

1. Standard of Review

Motions for relief from judgment are subject to the trial court's discretion. *Lussier v. Dugger*, 904 F.2d 661, 667 (11th Cir. 1990). Accordingly, this Court reviews the bankruptcy court's decision under an abuse of discretion standard.

2. The Supreme Court Decision

Debtors/Appellants argue that the bankruptcy court abused its discretion when it denied the Motion for Relief from Judgment after the Supreme Court decision in *Holywell v. Smith*, 112 S.Ct. 1021, 117 L. Ed. 2d 196 (1992). The Supreme Court decision was limited to the issue of the Trustee's responsibility to file tax returns and pay federal taxes. The Court held that the failure of a plan of reorganization to provide for the taxes did not bind federal tax authorities. This decision does not effect the issues raised in the Complaint.

In the 1987 Complaint at issue, the Debtors/Appellants alleged seven claims involving alleged breaches of duty and other wrongs by the Trustee and the Bank. However, only one of the seven claims related to the Supreme Court's decision and the Trustee's income tax liability.[1] The other six matters have already been addressed and final judgments have been entered in favor of the Bank and Trustee. As for the seventh claim, that issue has been pursued in a separate adversary proceeding. (No. 87-0627-BKC-SMW-A). On remand from the Supreme Court, the bankruptcy court held a trial on June 21-22, 1993. On September 30, 1993 it entered final judgment against the Debtors and issued Findings of Fact and Conclusions of Law.[2] In its findings, the bankruptcy court specifically addressed the Supreme Court decision and found there is no basis for the Debtors[']claims against the Trustee or the Bank even in light of the Supreme Court decision. In fact, the bankruptcy court stated that "[t]he Supreme Court's tax decision has not changed the result of the debtors' prior unsuccessful attacks on the Trustee." *See* September 30, 1993 Findings of Fact an[d] Conclusions of Law on the Debtors[']Counterclaims Against the trustee and Cross-Claims Against the Bank of New York, at 13. This Court agrees and finds that in

---

[1] The other six claims related to 1) post-petition interest, 2) post-closing adjustments involving the 1985 conveyance of Miami Center, 3) "super-priority" loans, 4) withholding taxes of employees, 5) real estate taxes, and 6) various combinations of assets, liabilities and loans.

[2] The bankruptcy court's decision was issued after the parties in the instant appeal submitted their briefs, but the Trustee filed the decision with this Court on October 1, 1993.

denying the Motion for Relief from Judgment, the bankruptcy court did not abuse its discretion.

Timeliness

Appellees also argue that even if the Supreme Court decision warranted relief, the Debtors/Appellants did not seek such relief within a reasonable time. Under Bankruptcy Rule 9024, a motion pursuant to Fed. R. Civ. P. 60(b) must be made "within a reasonable time." The Supreme Court issued its decision on the tax obligations of the Trustee on February 25, 1992. The Debtor/Appellants did not file their Rule 60(b) motion until April 2, 1993. The Court also notes that at the time of this case, Local Bankruptcy Rule 10 of the Southern District of Florida provided the following: "Whenever a party is authorized by statute or rule to file a motion, application or other pleading in or in connection with a bankruptcy case or proceeding and no time is specified for the pleading to be filed, it shall be filed within ten days after the event that precipitated the pleading."[3] In sum, the Court finds that even if the Supreme Court's decision required the bankruptcy court to provide relief under Rule 60(b), Debtors/Appellants did not file their motion "within a reasonable time" and the bankruptcy court did not abuse its discretion in denying the motion.

---

[3] Local Bankruptcy Rule 10 was eliminated by the Local Rules of the United States Bankruptcy Court for the Southern District of Florida which became effective April 1, 1994.

CONCLUSION

For the reasons stated above, it is

ORDERED AND ADJUDGED that the April 30, 1993 Order of Bankruptcy Judge Sidney M. Weaver be, and the same is hereby, AFFIRMED. This case is closed.

DONE AND ORDERED in Chambers at Miami, Florida, this 19th day of May, 1994.

/s/ _____
K. MICHAEL MOORE
UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

HOLYWELL CORP., *et al.*,	Chapter 11
Plaintiffs,	Case Nos.
vs.	84-01590-BKC-SMW
THE BANK OF NEW YORK, *et al.*	84-01591-BKC-SMW
Defendants.	84-01592-BKC-SMW
_____/	84-01593-BKC-SMW
In re:	84-01594-BKC-SMW
HOLYWELL CORPORATION, MIAMI CENTER LTD. PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,	Adv. Case No. 87-0546-BKC-SMW-A
Debtors.	
_____/	

ORDER DENYING DEBTORS/
PLAINTIFFS' RULE 60(b) MOTION

THIS MATTER having come before the Court on April 20, 1993, on the Debtors/Plaintiffs' Rule 60(b) Motion for Relief from this Court's Order Dismissing Complaint, etc., and the Court having reviewed the file, having heard argument of counsel, and having considered the memoranda filed in support of and in opposition to the Motion, and being otherwise duly advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion is denied.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida this 30th day of April, 1993.

SIDNEY M. WEAVER
United States Bankruptcy Judge

Copies furnished to Herbert Stettin, Esq. who shall mail conformed copies to all counsel of record.

APPENDIX D

In re HOLYWELL CORPORATION, et al.

MIAMI CENTER LIMITED PARTNERSHIP, Miami Center Corporation, Theodore B. Gould, Chopin Associates and Holywell Corporation, Appellants.

v.

The BANK OF NEW YORK, City National Bank of Miami as Trustee under Land Trust #5008793, M.C. Holding[s] Partners, a New York General Partnership, and its General Partners, namely Robank Corporation, H.D. Liquidation, Inc., Bott Florida Holding Corporation, American Security, Ltd., and M. Center Corporation and Fred Stanton Smith, individually and as Trustee of the Miami Center Liquidating Trust, Appellees.

No. 88-1302-CIV.
Bankruptcy Nos. 84-01590-BKC-SMW to 84-01594-BKC-SMW.

United States District Court,
S.D. Florida,
Miami Division.

Oct. 31, 1988

. . .

MEMORANDUM OPINION

SPELLMAN, District Judge.

ORDER AFFIRMING
BANKRUPTCY COURT

THIS CAUSE comes before the Court upon the Appellants, HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD, appeal of the *Order Granting Motions to Dismiss and Dismissing Adversary Complaint* entered by the United States Bankruptcy Court for the Southern District of Florida on May 12, 1988.

A. STANDARD OF REVIEW

The Bankruptcy Court's findings of fact are subject to the clearly erroneous standard. *Briden v. Foley*, 776 F.2d 379 (1st Cir.1985). Questions of law are subject to the *de novo* standard of review. 11 U.S.C. Bankruptcy Rule 8013; *Anderson v. Bessemer City, N.C.*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

B. BACKGROUND

The Plaintiffs originally filed this action in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida against Fred Stanton Smith (the "Liquidating Trustee") individually and as trustee of the Miami Center Liquidating Trust, the Bank of New York ("BNY"), City National Bank of Miami, M.C. Holding Partners, a New York general partnership and its general

partners, Robank Corp., H.D. Liquidation, Inc., Zentac Investments, Inc., BOTT Florida Holding Corp., American Security Ltd. and M. Center Corporation.

The Complaint alleged negligence (Count I), Breach of Fiduciary Duty (Count II), Discharge of Trustee (Count III), Breach of Contract (Count IV), and Conversion (Count V). The Defendants filed a Petition for Removal of the State Court Action to the Bankruptcy Court under 28 U.S.C. § 1452 and Bankruptcy Rule 9027. The Debtors moved for remand. The Bankruptcy Court heard the Application for Removal and the Motion for Remand on December 15, 1987, and found that the underlying issues set forth in the Complaint were "core" matters under 28 U.S.C. § 157. The Bankruptcy Court recommended that this Court certify the Petition for Removal and deny the Motion for Remand. This Court affirmed and adopted that Report and Recommendation. *Holywell v. Bank of New York*, Case No. 88-0034-CIV-EPS.

The Defendants filed a motion in the Bankruptcy Court to dismiss the Complaint and for sanctions. The Bankruptcy Court granted the Motion to Dismiss on the following grounds: 1) the Complaint failed to sufficiently allege that the Liquidating Trustee was guilty of gross negligence, willful default, or misconduct; and 2) all matters set forth in the Complaint had either been resolved by the Bankruptcy Court in other adversary proceedings or motions (which rulings either constitute final orders or are presently on appeal), or are the subject of pending adversary proceedings or motions which will be determined by the Bankruptcy Court. The Bankruptcy Court denied the motion for sanctions on the ground that at the time the action was filed in state court, certain issues

raised in the Complaint were not subject to a prior judicial determination.

The Complaint, which is characterized by the Debtors as a common law action for a breach of fiduciary duty by the Liquidating Trustee, is based on the following alleged improper conduct of the Liquidating Trustee:

> 1) The granting to BNY of a credit of $27,050,115.02 representing a claim for accrued post-petition interest;
>
> 2) the failure of the Liquidating Trustee to resolve certain post-closing adjustments in favor of the Debtor, including an alleged credit to MCLP for the completion of leasehold improvements, an alleged reduction in the credit granted BNY for 1985 real estate taxes, and an alleged reduction in the credit granted BNY for an allowance of construction materials;
>
> 3) the failure of the Liquidating Trustee to establish a reserve for the payment of income taxes;
>
> 4) the failure of the Liquidating Trustee to provide a reserve to pay certain alleged super-priority loans due to the Plaintiffs from MCLP;
>
> 5) the failure of the Liquidating Trustee to sue BNY as an "employer in fact" under Internal Revenue Section 3505 to recover from BNY withholding taxes which were paid by the Liquidating Trustee to the Internal Revenue Service;
>
> 6) the consent of the Liquidating Trustee to the establishment of an escrow account to provide for the payment of certain real estate taxes owed to Dade County, Florida;

7) the failure by the Liquidating Trustee to pay claims of affiliated creditors including creditors classified as Class 8 creditors under the Plan of Reorganization, the failure to pay Chopin alleged ground rent due in the amount of $5.3 million, the failure to pay the claim of Miami Center Joint Venture ("MCJV") and the failure to pay other administrative claims of affiliated creditors.

Article V of the Plan contemplated the establishment of the Miami Center Liquidating Trust and the appointment of the Liquidating Trustee to implement the provisions of the Plan and "hold, liquidate and distribute such Trust Property according to the terms of this Plan." The Plan provided for the substantive consolidation of the Debtors and for the subordinate classification of claims of all affiliated or debtor-related entities. The Plan also provided for a separate mechanism of the payment of the claim of Olympia & York ("O & Y"), a partner of Plaintiff Gould in MCJV, in the event that the subordinated classification of the claim of MCJV was reversed on appeal.

The Plan was confirmed by order (the "Confirmation Order"), and became effective on October 10, 1984. This Confirmation Order was subsequently affirmed on appeal. *Holywell Corp. v. Bank of New York*, 59 B.R. 340 (Bankr.S.D.Fla.1986). The Eleventh Circuit Court of Appeals vacated and remanded, holding that the Plan was "substantially consummated at the time the appeal was heard by the District Court" and directing the District Court to dismiss the appeal as moot. *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.1988).

The parties in this case have filed various adversary proceedings in the Bankruptcy Court since the entry of the Confirmation Order. Those proceedings include collateral attacks on the various aspects of the Plan as well as requests for clarification and guidance by the Liquidating Trustee.

C. ISSUES

There are three major issues which this Court must address:

> 1) whether the Bankruptcy Court properly dismissed the complaint alleging common law breach of fiduciary duty, where a provision of the confirmed plan of reorganization established a standard of "gross negligence, willful default or misconduct" to establish the Trustee's liability for breach of fiduciary duty;
>
> 2) whether the Bankruptcy Court properly ruled that all matters set forth in the Complaint had either been resolved by the Bankruptcy Court in other adversary proceedings or motions (which rulings either constitute final orders or are presently on appeal), or were the subject of pending adversary proceedings or motions;
>
> 3) whether the Bankruptcy Court had subject matter jurisdiction over this action, where the Plaintiffs alleged a constitutional right to trial by jury.

After *de novo* review, this Court hereby affirms the Bankruptcy Court's dismissal of the Complaint and sets forth its findings as follows:

1. *The Confirmed Plan of Reorganization Establishes the Law of the Case*

The Appellants argue that although the Plan sets forth a standard of gross negligence, willful default or misconduct for breach of fiduciary duty, the correct standard in a common law action is due care, diligence and skill. The Appellants argue that the Bankruptcy Court can not limit this common law duty even where a trust expressly limits liability. *U.S. ex rel Willoughby v. Howard*, 302 U.S. 445, 58 S.Ct. 309, 82 L.Ed. 352 (1938). In *Willoughby*, the Court stated that "[b]y the common law every trustee or receiver of an estate has the duty of exercising reasonable care in the custody of the fiduciary estate unless relieved of such duty by agreement, statute, or order of court." *Id.* at 450, 58 S.Ct. at 312. The Court went on to say that the fact that a fiduciary's freedom of choice was limited by statute did not relieve that fiduciary from the common law duty of "exercising care and prudence within the field left to his discretion." *Id.* at 452, 58 S.Ct. at 313.

In the case *sub judice*, the allegations of misconduct refer not to "the field left to [the trustee's] discretion" but rather to duties that were required by the Confirmed Plan of Reorganization. The Appellants assert that the Plan established a minimum standard of care, and that the Trustee was still liable *under a common law duty* to a higher standard.

This argument overlooks the fact that the Appellants are not claiming that the Trustee breached his common law duty while acting within the provisions of the Plan, but rather that his actions under the plan *themselves*

breached his common law duty. Thus the two standards here are in direct conflict.[1] The question is therefore not whether the Plan relieved the Trustee of his common law duty, but whether the duties required by the Plan were controlling.

As stated above, *Willoughby* held that a trustee has the common law duty of exercising reasonable care *"unless relieved of such duty by agreement, statute, or order of court." Willoughby* at 450, 58 S.Ct. at 312. Here, such agreement did exist. The provisions of a confirmed plan bind all parties whose rights are affected by the plan, regardless of whether they voted to accept it. *In re Sanders*, 81 B.R. 496, 499 (Bankr.W.D.Ark.1987). "Once the confirmed plan has become consummated, it becomes the law of the case." *In re Jartran, Inc.*, 76 B.R. 123, 125 (Bankr.N.D.Ill.1987). Further, "a party in interest . . . is bound by the terms of the plan when confirmed, even if the plan ultimately provides it with less than that to which it is otherwise entitled." *In re St. Louis Freight Lines, Inc.*, 45 B.R. 546, 552 (Bankr.E.D.Mich.1984). Thus, where the allegations contained in the Complaint involve duties required under the Plan, those duties control and the Trustee is relieved of personal liability for any conflicting duties under the common law.

---

[1] The Appellants' allegations are in direct conflict with the Bankruptcy Court's rulings under the Plan. Those rulings are discussed in detail under Section 2 of this Order.

2. *All Allegations Set Forth in the Complaint Have Either Been Resolved or Are Presently Pending*

The Appellants allege breach of specific duties by the Trustee. As discussed below, each alleged breach has been fully litigated or is presently pending appeal. The Appellants are barred by both *res judicata* and collateral estoppel from relitigating these issues in this action.

a. *granting BNY a credit of $27,050,115.02 representing a claim for accrued post-petition interest*

The Bankruptcy Court previously held that this credit was valid under the Plan and that BNY was not an "unsecured creditor." *Adv. Proc. No. 87-0523-BKC-SMW-A.* On appeal, District Court held that allowance of the credit for post-petition interest to BNY was an integral part of the Plan and that all aspects of the Plan were valid, legally binding on all parties, and insulated from further attacks. *Holywell v. Fred Stanton Smith and the Bank of New York,* Case No. 88-151-CIV-SMA.

b. *failure to resolve certain post-closing adjustments in favor of the Debtor*

This issue is presently pending before the Bankruptcy Court. *Adv. Proc. No. 87-0523-BKC-SMW-A.* This action was brought by the Trustee and the Debtors attempted to have the matter dismissed on the grounds that the Bankruptcy Court lacked jurisdiction over these post-confirmation matters. The Bankruptcy Court rejected this argument and refused to dismiss the action.

c. *failure to establish a reserve for the payment of income taxes*

The Bankruptcy Court held that the Trustee was not responsible for the filing of federal income tax returns on behalf of the Debtors or liable to the United States for the payment of any federal income taxes. *Adv. Proc. No. 87-0627-BKC-SMW-A.* An appeal of this ruling is presently pending. *United States of America v. Fred Stanton Smith,* Case No. 88-0795-CIV-JWK.

d. *failure to provide a reserve to pay certain alleged super-priority loans due to the Plaintiffs from MCLP*

These super-priority loans are inter-debtor loans and loans made to a wholly-owned non-debtor subsidiary of Holywell. The Debtors have already filed an action in the Bankruptcy Court to require payment and that court has held that the loans are entitled to super-priority status but that payment can only be made from Miami Center Limited Partnership assets. *Case No. 84-01590-BKC-TCB.* This Order is presently on appeal. *Bank of New York,* Case No. 87-0970-CIV-JWK.

e. *failure to sue BNY as an "employer in fact" to recover withholding taxes which were paid to the Internal Revenue Service*

The Bankruptcy Court considered the issue of whether a party, other than IRS, could sue BNY to establish liability under the Code as an employer-in-fact. The court dismissed that complaint and held that only the IRS

could bring such an action. *Adv. Proc. 88-0518-BKC-SMW-A.* This ruling is presently pending on appeal.

f. *establishment of an escrow account to provide for the payment of certain real estate taxes*

The Bankruptcy Court entered an Order stating that the escrow fund established for the 1982-1984 real estate taxes was to continue for the specific purpose of paying any ad valorem taxes that were ultimately determined to be due and directed that the escrow be transferred to counsel for BNY and counsel for the Trustee as escrow agents. *Adv. Proc. No. 87-0618-BKC-SMW.*

g. *failure to pay claims of affiliated creditors*

The treatment of the claims of affiliates of the Debtors is governed by the Plan which provides for the subordinate classification of these claims. The Plan also provides a mechanism for the determination and payment of the MCJV claim and the Bankruptcy Court entered a final judgment determining the amount of those claims. *Adv. Proc. 87-0255-BKC-SMW-A.*

3. *The Bankruptcy Court Has Subject Matter Jurisdiction Over This Action*

This Court previously held that the Bankruptcy Court had subject matter jurisdiction over this action in its Order Affirming and Adopting the Bankruptcy Court's Report and Recommendation on Petition for Removal and Motion for Removal. *Holywell v. Bank of New*

York, Case No. 88-0034-CIV-EPS. That Order held that the claims set forth in the complaint were "core matters" under 28 U.S.C. § 157 and that the Bankruptcy Court had the authority to hear and determine the claims. This Court sees no reason to revisit this matter which was fully litigated in the aforementioned proceeding. Further, this Court's above finding that the Plan establishes the law of this case and that this action therefore fails to state a cause of action renders this issue moot. Accordingly, it is hereby

ORDERED AND ADJUDGED that this Order of the Bankruptcy Court dismissing the Complaint is AFFIRMED.

APPENDIX E

IN THE UNITED STATES BANKRUPTCY COURT
IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

HOLYWELL CORPORATION, et al., Debtors	CASE NO.: 84-01590/91/92/93/94 BKC-SMW-A
MIAMI CENTER LIMITED PARTNERSHIP, etc., et al., Plaintiffs, -vs- BANK OF NEW YORK, et al., Defendants.	ADV. NO: 87-0546 BKC-SMW-A

ORDER GRANTING MOTIONS TO DISMISS
AND DISMISSING ADVERSARY COMPLAINT

THIS CAUSE having come on to be heard on May 9, 1988 upon motion of Fred Stanton Smith individually, and as Liquidating Trustee of the Miami Center Liquidating Trust to dismiss the Adversary Complaint pending before the Court, and upon motion of the Bank of New York to Dismiss the Adversary Complaint pending before the Court, and for sanctions against the Plaintiffs, and the Court having reviewed the pleadings on file, having heard argument of counsel, and being otherwise fully advised in the premises, it is hereupon

ORDERED AND ADJUDGED as follows:

1. The motion to dismiss of Fred Stanton Smith individually be the same is hereby granted. The complaint contains no sufficient allegations that Fred Stanton Smith was guilty of gross negligence, willful default or misconduct, as provided Article 5, Paragraphs 7 and 8 of Confirmed Amended Consolidated Plan of Reorganization. Such allegations are required to establish individual liability under the terms of the Plan.

2. The motion to dismiss of Fred Stanton Smith as Liquidating Trustee of the Miami Center Liquidating Trust be and the same is hereby granted upon the ground that all matters contained in the Adversary Complaint have either been resolved by this Court in other pending adversary complaints or motions which were heard before the Court (and which rulings are presently on appeal) or are the subject of pending adversary proceedings or motions and which will be resolved in ordinary course.

3. The motion to dismiss of the Bank of New York is granted upon the same grounds as stated above concerning the motion to dismiss of Fred Stanton Smith as Liquidating Trustee of the Miami Center Liquidating Trust.

4. The motions for sanctions against the Plaintiffs are denied, based upon the Court's finding that the Adversary Complaint was originally filed on or about October 15, 1987 at a time when the matters involved had not been resolved.

DONE AND ORDERED in Chambers at Miami, Florida this 12 day of May, 1988.

/s/ Sidney M. Weaver
U.S. BANKRUPTCY JUDGE

APPENDIX F

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

ADV. PROC. NO.
87-0546-BKC-SMW-A

HOLYWELL CORPORATION, MIAMI CENTER CORPORATION, THEODORE B. GOULD, MIAMI CENTER LIMITED PARTNERSHIP, and CHOPIN ASSOCIATES,

Plaintiffs,

v.

BANK OF NEW YORK, CITY NATIONAL BANK OF MIAMI, as Trustee under Land Trust # 5008793, M. C. HOLDINGS PARTNERS, a New York general partnership, and its General Partners, namely ROBANK CORP., H. D. LIQUIDATION, INC., ZENTAC INVESTMENTS, INC., BOTT FLORIDA HOLDING CORP., AMERICAN SECURITY LTD., and M CENTER CORPORATION, and FRED STANTON SMITH, individually and as Trustee of the MIAMI CENTER LIQUIDATING TRUST,

Defendants

PLAINTIFFS' RULE 60(b) MOTION FOR RELIEF FROM THIS COURT'S ORDER DISMISSING COMPLAINT ALLEGING NEGLIGENCE, BREACH OF FIDUCIARY DUTY, BREACH OF CONTRACT, AND CONVERSION

Plaintiffs Holywell Corporation, Miami Center Corporation, Miami Center Limited Partnership, and Chopin Associates, appearing through counsel, and Theodore B.

Gould, appearing *pro se* (hereinafter referred to as "Plaintiffs"), respectfully request relief under Rule 60(b)(5) of the Federal Rules of Civil Procedure[1] from the order of this Court, entered on May 12, 1988, dismissing the subject Complaint against Defendants Fred Stanton Smith,

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[1] Section 60(b), MISTAKES, INADVERTENCE, EXCUSABLE NEGLECT, NEWLY DISCOVERED EVIDENCE, FRAUD, ETC. of Rule 60, *Relief From Judgment or Order*, of the Federal Rules of Civil Procedure provides, in relevant part, as follows:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 60(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or *a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment shall have a prospective application*; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. Section 1655, or to set aside a judgment for fraud upon the court. . . . (Emphasis added)

individually and as Trustee of the Miami Center Liquidating Trust, Bank of New York, City National Bank of Miami, as Trustee under Land Trust #5008793, M. C. Holdings Partners, a New York general partnership, and its general partners, namely Robank Corp., H. D. Liquidation, Inc., Zentac Investments, Inc., BOTT Florida Holding Corporation, American Security Ltd., and M Center Corporation (hereinafter collectively referred to as the "Defendants"), and say as follows:

Statement of Proceedings

1. Plaintiffs originally filed this Complaint on October 15, 1987, in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida against the Defendants. The Complaint alleged Negligence By Defendant Smith (Count I), Breach of Fiduciary Duty By Defendant Smith (Count II), Equitable Relief Against Defendant Smith (Count III), Breach of Contract (Count IV), and Conversion By Defendant Bank of New York (Count V).

2. The facts pertinent to this Rule 60(b)(5) motion alleged in the cause of action as evidence of negligence, breach of fiduciary duty, breach of contract, and conversion were as follows:

(a) Defendant Smith commingled the funds and failed to provide a proper accounting segregating the assets and liabilities of the various estates in his fiduciary custody.[2]

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[2] On February 11, 1988, Donald A. Denkhaus, of Arthur Andersen & Co., the Liquidating Trust's accountant, testified in

(b) Defendant Smith failed to establish a reserve for the payment of income taxes attributable to the sale of the property of the various estates in his fiduciary custody,

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Fred Stanton Smith, etc. v. United States of America, Holywell Corporation, et al., 87-0627-BKC-SMW, that the trustee had commingled the accounting and funds in his fiduciary custody as follows:

MR. GOULD: "As Trustee's accountants, have you segregated the assets in your accounting of the various debtors' estates including the assets of the nonfiled companies, Twin Development and the other subisdiaries?"

MR. DENKHAUS: "No, we have not."

. . .

MR. MUSSELMAN: "Sir, you said previously that you did not, in the accounting work that you did, segregate the accounts of the different entities. Can you tell us why that was your policy?"

MR. DENKHAUS: " . . . When the original monies came into the trust, there was a transfer of ownership of the individual bank accounts that came in, and those accounts were later consolidated and investments were consolidated and, as recommended by counsel, Mr. Wolff . . . he believed that the liquidating trust was given a consolidated amount of money and it was not the responsibility of the liquidating trustee to separately try to account for the source or payment of those funds."

MR. MUSSELMAN: "So that neither the source nor the particular claims that were paid were identified?"

MR. DENKHAUS: "That is correct. . . . [T]here may have been one defined debtor that was responsible for that payment, but the accounting records that were set up did not segregate and track them by debtor entity."

MR. MUSSELMAN: "You are testifying that this was because there was a transfer of ownership of the cash?"

. . .

MR. DENKHAUS: "Yes. . . . "

and to pay the taxes due within the prescribed time for such payment.[3]

(c) Defendant Smith failed to pay the claim of the Miami Center Joint Venture ("MCJV") for rents and late charges under the "A" and "B" Leases in the amount of *$7,338,152* from the proceeds of the sale of the Miami Center Limited Partnership's property in accordance with

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[3] Article V, *Creation of Trust*, 3(w) of the Bank's Plan required Defendant Smith to "[d]eal with the Trust Property or any part or parts thereof in all other ways as would be lawful for any person owning the same to deal therewith, whether similar to or different from the ways above specified [in the Bank's plan], at any time or times hereafter." Furthermore, this Court's Order Appointing Trustee, entered on August 12, 1985, authorized the trustee to engage attorneys and accountants " . . . for the purpose of analyzing the legal rights and financial position of the debtors and their respective subsidiaries" and on February 11, 1988, Mr. Smith testified in pertinent part as follows:

MR. GOULD: "Does the Bank of New York plan provide that you do not have a fiduciary duty to determine the amount of the debtors' . . . federal and state tax liability?"

MR. SMITH: "No."

MR. GOULD: "Does anything in the Bank of New York's plan state that you do not have the responsibility to prepare the debtors' tax returns?"

MR. SMITH: "No."

MR. GOULD: "Does anything in the Bank's plan state that you do not have the responsibility to establish reserves for the payment of the debtors' federal and state income tax liabilities?"

MR. SMITH: "No."

Transcript (Bkrtcy. S.D. Fla.), *Smith, etc. v. United States, et al.*

MCJV's superior contractual and statutory priority to the Bank of New York's liens securing its Class 2 Claim.[4]

(d) Defendant Smith allowed the Bank of New York to take *$27,050,115.02* for postpetition interest on the Bank's "undersecured" Class 2 secured Claim as a credit against the purchase price for the Miami Center's sale at the appraised fair market value of $255,600,000,[5] causing

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[4] On June 23, 1986, the district court held, in pertinent part, as follows:

> "The Bank gave its approval of the protective provisions of the Leases that would assure MCJV's priority rights as owner. . . . The Bank accepted and acceded to the full subordination of its entire first mortgage lien. . . . Appellant Bank clearly recognized the priority ownership/lessor status of the MCJV as to the FF&E under both leases. . . . The Bank filed UCC-1 forms reflecting and recording priority rights of MCJV as owner. Such rights were superior to those of the Bank as well as to general and unsecured creditors."

(S.D. Fla., *Bank of New York v. Miami Center Joint Venture, O&Y Florida Equity Corp., and Theodore B. Gould*, No. 85-3430-Civ-Atkins, aff'd, *In re Holywell Corp.*, No. 86-5609 (11th Cir., October 12, 1988)

[5] Irving M. Wolff, Esq., the Liquidating Trust's attorney at the closing of the Miami Center's sale, has testified that Mr. Smith sought and obtained indemnification from the Bank of New York " . . . for any claims against said Liquidating Trustee, as a result of the execution of the Contract . . . or any other provision of the [Bank's] Plan," since under the Plan " . . . all right, title and interest of the Debtor in and to the Trust Property, including Miami Center, shall vest in the Trustee . . . " on the Effective Date (page 20 of the Plan), and ' . . . the Trustee shall have full power and authority to: . . . (c) reduce all of the Trust Property to *his* possession and hold the same . . . ' (page 21 of the Plan, emphasis added)." See *Indemnity*, October 10, 1985.

the Trustee to misappropriate the funds of Holywell Corporation and its nondebtor subsidiaries to pay the principal amount of Undisputed Claims against the Miami Center Limited Partnership *without* first establishing a reserve to pay taxes as a debt to the Government, *compare* 31 U.S.C. Section 3713(b), arising from the sale of the Washington Properties and the Miami Center's sale in accordance with the provisions of the Bank's plan.

(e) Defendant Smith failed to repay certain Court-authorized super-priority loans from the Miami Center Limited Partnership's assets prior to the payment of all other MCLP creditors, including administrative expenses.

(f) Defendant Smith's consent to the establishment of an escrow account at the Bank of New York's request to provide for the payment of certain real property taxes owed to Dade County, Florida, imposing the payment of interest in the amount of *$1,666,279* on the estate of Chopin Associates in his fiduciary custody.[6]

Mr. Wolff has testified that notwithstanding " . . . the express non-recourse language on page 25 of the Plan," *Id.*, Defendant Smith sought indemnification from the Bank of New York:

> " . . . so that if any claims were made upon the Liquidating Trustee for payment of unpaid taxes, i.e., Internal Revenue Service claims, which would result from the sale and transfer of the property at the closing, the question and the payment of the allowed super-priority claims, the accountability to the unfiled subsidiaries, and the question of the charging of post-bankruptcy interest, the Liquidating Trustee would be completely indemnified and saved harmless from such exposure."

[6] On October 10, 1985, Defendant Smith consented to the Bank of New York's postconfirmation modification of the

(g) Defendant Bank of New York's conversion of monies owed to the Liquidating Trust upon effectuation of the closing adjustments required under the Amended Contract of Sale and the Bank's refusal to turn over possession of monies it wrongfully retained after the conveyance of title, including the accounts receivable and fair market value of the property of Holywell Telecommunications Company and Holywell Leasing Company, solvent nondebtor subsidiaries of Plaintiff Holywell Corporation.[7]

Contract of Sale, *without* notice, hearing, or court approval, as required under 11 U.S.C. Section 1127(b), for the establishment of an " . . . escrow from the closing proceeds due Seller sufficient funds to pay the 1983 and 1984 real estate and personal property taxes together with interest . . . " and granted the Purchaser " . . . the right to continue to contest the *ad valorem* tax assessments on the property for the years 1983, 1984, and 1985, on behalf of the Seller . . . " and the Amended Contract's paragraph 13 provided, in relevant part, as follows:

> " . . . that Purchaser shall be permitted to make the determination to dismiss or settle any such tax protests, suits or claims in the event Purchaser determines, in its sole judgment, that it is in the best interest of the Purchaser to do so."
>
> "If Purchaser elects, in its sole discretion, to have Seller dismiss or settle any such tax protests, suits or claims, *Purchaser shall indemnify, defend and hold Seller [Trustee] harmless* for and against any and all loss or damage Seller may incur. . . . " (Emphasis added)

[7] The accounts receivable and fair market value of the property of Holywell Telecommunications Company and Holywell Leasing Company included rent due from the "C" and "D" leases to the Miami Center Limited Partnership and third-party leases to Southern Bell, Chase Bank International, and others. The accounts receivable and property's fair market value exceeded *$13,000,000* as of October 10, 1985.

3. The Defendants filed a Petition for Removal of the State Court action to this Court under 28 U.S.C. Section 1452 and Bankruptcy Rule 9027. This Court recommended that the district court certify the Petition for Removal and deny the Plaintiffs' Motion for Remand. The district court affirmed and adopted this Court's Report and Recommendation.

4. The Defendants filed a motion to dismiss the Complaint and for sanctions. This Court entered an order granting the Motion to Dismiss on May 12, 1988, on the following grounds: (a) the Complaint failed to sufficiently allege that Defendants Smith and the Bank of New York were guilty of gross negligence, willful default, or misconduct; and (b) all matters set forth in the Complaint had either been resolved by this Court in other adversary proceedings or were the subject of pending adversary proceedings. This Court denied the motion for sanctions on the ground that at the time the action was filed in State Court, certain issues raised in the Complaint were not the subject of this Court's prior judicial determination.

5. The district court affirmed in a Memorandum Opinion, entered on October 31, 1988, and reported at *93 B.R. 780* (S.D.Fla., 1988), on the ground that the provisions of a confirmed plan bind all parties whose rights are affected by the plan, *supra* at 783, and " . . . where the allegations contained in the Complaint involve duties required under the Plan, those duties control and the Trustee is relieved of personal liability for any conflicting duties under the common law," *Id*. The district court also held that the Plaintiffs " . . . are barred by both *res judicata*

and collateral estoppel from relitigating . . . issues" concerning Defendant Smith's (a) "failure to establish a reserve for the payment of income taxes," since this Court had " . . . held that the Trustee was not responsible for the filing of federal income tax returns on behalf of the Debtors or liable to the United States for the payment of any federal taxes," *supra* at 784; (b) granting the Bank of New York a credit of *$27,050,115.02* for postpetition interest on its undersecured claim was an "integral part of the [Bank's] plan," *supra* at 783, and misappropriation of the cash of Holywell Corporation and its nondebtor subsidiaries to pay the principal amount of claims against the Miami Center Limited Partnership;[8] and (c) failure to pay claims of affiliated creditors since "[t]he treatment of the claims of affiliates of the Debtors is governed by the Plan which provides for the subordinate classification of these claims . . . [and] a mechanism for the . . . payment of the MCJV claim. . . . " *Supra* at 784.[9]

MEMORANDUM OF LAW

Under the Federal Rules of Civil Procedure, Rule 60(b)(5) provides that on motion and with such terms as

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[8] Defendant Smith has also paid interest to the unsecured creditors in the amount of *$1,485,914* although the amended provisions of the Bank's Plan required a determination that there were adequate funds available to pay *all* of the liabilities of the debtors' estates and limited the payment of interest to 90 days.

[9] The Eleventh Circuit Court of Appeals affirmed, without argument, in a opinion entered on July 7, 1989, No. 88-6187; a petition for rehearing was denied on August 29, 1989, and the Supreme Court denied a petition for writ of certiorari.

are just, a court may provide relief to a party from a final order if " . . . a prior judgment upon which it is based has been reversed or otherwise vacated. . . . " In this case, as we previously explained, the district court affirmed this Court's dismissal of this cause of action, alleging negligence, breach of fiduciary duty, breach of contract, and conversion, based (a) on the application of the doctrine of collateral estoppel and the principles of *res judicata* with respect to various prior judgments which have been reversed or vacated; and that (b) the duties required by the Plan were controlling, *supra* at 783, and relieved the trustee of the duty of exercising reasonable care of the fiduciary estates in his custody, establishing instead a standard of "gross negligence, willful default or misconduct."[10] The district court's conclusion was that " . . . the allegations of misconduct refer not to 'the field left to [the trustee's] discretion' but rather to duties that were required by the Confirmed Plan of Reorganization." *Id.*

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[10] Article V, *Creation of Trust*, provides, in relevant part, as follows:

"7. No recourse shall ever be had, directly or indirectly, against the Trustee or any of his agents or employees personally by legal or equitable proceedings or by virtue of any statute or otherwise, it being expressly understood and agreed that all liabilities of the Trustee or such agents and employees under this Trust shall be enforceable only against and be satisfied only out of the Trust property.

8. The Trustee shall not be liable for any act or failure to act in his capacity as trustee hereunder while acting in good faith and in exercise of his best judgment, nor shall the Trustee be liable in any event except for his own gross negligence, willful default or misconduct."

1. The Supreme Court's Opinion, cited as *Holywell Corporation, et al. v. Smith, et al.*, 503 U.S. ___, 112 S.Ct. 1021 (1992), *reversed* the judgment that " . . . neither the provisions of the Plan nor the statutory provisions obligate the liquidating trustee to file income tax returns or pay taxes." *In re Holywell Corp.*, 911 F.2d 1539, 1546 (11th Cir. 1990).

(a) The Eleventh Circuit Court of Appeals " . . . accept[ed] jurisdiction to decide whether the liquidating trustee breached his duty either under the terms of the Plan or other statutory provisions," 911 F.2d at 1546, but the Supreme Court's *Holywell* opinion adopted the position of the debtors, *slip op.*, p. 7, and stated as follows:

> We conclude in this case that the trustee must pay the tax due on the income attributable to the corporate debtors' property because Section 6012(b)(3) requires him to make a return as the "assignee of the property . . . of a corporation." We further hold that the trustee must pay the tax due on the income attributable to the individual debtor's property because Section 6012(b)(4) requires him to make a return as the "fiduciary" of a "trust." *Slip op.*, p. 3. (see Exhibit A)

Furthermore, the Supreme Court held that the Internal Revenue Code ties the duty to pay federal income taxes in accordance with 26 U.S.C. Section 6151(a) (see Exhibit A) to the duty to make an income tax return. *Id.* Thus, Defendant Smith was required to file full and accurate returns within prescribed time limitations and pay the taxes due and owing within the time designated for such

payment, see *47 ALR 34d 507.*[11] The burden is on the trustee and the Liquidating Trust's attorneys and accountants to prove that seeking indemnification from the Bank of New York with respect to claims for the payment of income taxes, arising from the Miami Center's sale, *see p.5, n.5,* instead of seeking an amendment to the Plan's provision for the distribution of the Trust Property[12] to provide for the payment of future taxes as a debt to the Government in accordance with the express absolute statutory priority under 31 U.S.C. Section 3713(a)(1), was *not*

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[11] 47 ALR 34d 507, *Liability of Executor, Administrator, Trustee, Or His Counsel, For Interest, Penalty Or Extra Taxes Against Estate Because Of Tax Violations,* states in relevant part, as follows:

> "To the extent . . . that positive duties are imposed . . . upon fiduciaries, it would seem clear that the commonest, and certainly the most important, are the duties (1) of filing full and accurate returns, or of providing full and accurate information to taxing authorities, within prescribed time limitations, and (2) of paying any taxes found to be due and owing at or within the time designated for such payment. Since the handling of tax matters in general, and the payment of taxes in particular, are ordinarily among the most essential tasks or obligations of a fiduciary in connection with the administration of an estate or trust, it is not surprising that the courts have taken a rather strict view of a fiduciary's responsibility – and that of his counsel, for penalties, interest, or added taxes which were assessed." *47 ALR 34d at 510.*

[12] See *King v. United States,* 379 U.S. 329, 338-339 (1964) [Trustee personally liable for failing to seek amendment to pay taxes.]

misconduct and an act of *bad faith*. See *76 Am.Jur.2d, Trusts, Section 305.*[13]

(b) Since the requirement that a trustee must act in good faith in the administration of a trust means that he must act with undivided loyalty to the trust estate, or its beneficiary, and is not to act in his own interest or in the interest of a third party, see *76 Am.Jur.2d, Trusts, Section 316*, the trustee, and the Liquidating Trust's attorneys and accountants, must explain what the benefits were of commingling the accounting of the various estates in his fiduciary custody.[14] See *Palmer v. Webster & Atlas Nat'l Bank*, 312 U.S. 156, 163-67 (1941) [A trustee administering various estates is required to keep separate accounts and may not use the assets of one to pay the taxes of another.]

The Defendant Smith must also explain why he should not be held personally liable for the assets originally "placed" in the trustee's hands, see *Nicholas v. United States*, 384 U.S. 678, 694 n. 28 (1966).[15] The Defendant Bank of New York must explain why it is not liable

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[13] 76 Am. Jur. 2d, *Trusts*, Section 305 states the principle of the law of trusts that the terms of a trust may, in proper circumstances, validly limit a trustee's liability in respect to the administration of the trust, although such a provision will be construed strictly against him and an ordinary exemption or nonrecourse provision in the trust instrument will not save the trustee from liability for bad faith.

[14] Plaintiff Theodore B. Gould, the Liquidating Trust's beneficiary, incurred legal and accounting expenses of *$2,579,926* to segregate the trustee's commingled accounting and provide the information required to file income tax returns for the separate taxable entities for which the trustee was responsible.

[15] In *Nicholas v. United States*, the Supreme Court held that a trustee was an officer of the court and his liability was at least

to the Trust's beneficiary for the cash and value of the property which the trustee misappropriated after the Bank[16] agreed to hold him harmless for his actions. See *Seminole Nation v. United States*, 316 U.S. 286, 62 S.Ct. 1049, 1054 (1942).[17]

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coextensive with the assets originally placed in his hands. Furthermore, if the trustee breached his obligation to pay taxes owed the United States, he could not defeat recovery by the fact that he had improperly paid assets to other creditors.

[16] Defendant Smith is not without means to seek relief from personal liability for his conduct. He could sue the Bank, as the Amended Plan's proponent, and seek damages for fraud in a case connected with title 11. The trustee could also seek to recover payments he wrongfully made to the Bank and other creditors. See *11 U.S.C. Section 503(j)*; also *Danning v. General Motors Acceptance Corp.*, 779 F.2d 480 (9th Cir. 1985).

[17] In *Seminole Nation*, the Supreme Court held, in relevant part, as follows:

"It is a well established principle of equity that a third party who pays money to a fiduciary for the benefit of a beneficiary, with knowledge that the fiduciary intends to misappropriate the money or otherwise be false to his trust, is a participant in the breach of trust and liable therefore to the beneficiary. Cf. *Duncan v. Jaudon*, 15 Wall. 165, 21 L.Ed. 142; *Manhattan Bank v. Walker*, 130 U.S. 267, 9 S.Ct. 519, 32 L.Ed. 959. See Bogert, *Trusts and Trustees*, (1936), vol. 4, Sections 901, 955; Scott, *Trusts*, (1939), vol. 3, Section 321.1; American Law Institute, *Restatement Of The Law Of Trusts*, (1955), Section 32."

2. The judgment of the Eleventh Circuit Court of Appeals, cited as *In re Holywell Corp.*, 913 F.2d 873 (11th Cir. 1990), affirmed the *reversal* of the bankruptcy court's Confirmation Order, entered on August 8, 1985 (reported at 54 B.R. 41) which approved the classification structure of the Bank's Plan, subordinating the valid claims of insiders, and the Plan's Second Amendment, providing for issuance of a Trustee's Certificate to the Bank for repayment of a loan to the Trustee to pay MCJV's Claim.

(a) In this case, the judgment of the Eleventh Circuit Court of Appeals deals with the wrongful subordination of MCJV's Claim No. 502 for the payment of unpaid rent and the failure of the Bank's Plan to provide for the payment of the fair market value of MCJV's property from the proceeds of the Miami Center's sale in accordance with the adequate protection requirements of 11 U.S.C. Section 361(3).

The Eleventh Circuit held, in relevant part, as follows:

> "Section 1129 of the Bankruptcy Code provides two mechanisms for confirmation of a Chapter 11 plan of reorganization. The first requires satisfaction of all subsection (a) requirements, including (a)(8), which necessitates acceptance of the plan by all impaired classes or interests. The second mechanism, the mechanism by which the plan was confirmed in this case, incorporates all the requirements of subsection (a), except for (a)(8), and requires that the plan not discriminate unfairly and be fair and equitable with respect to each class of impaired claims or interests that have not accepted the plan.

> [Footnote omitted] *At issue in this appeal is whether the Bank's plan complies with the applicable provisions of title 11, namely section 1122.* See 11 U.S.C. Section 1129(a)(1) (requiring that the plan comply with the provisions of title 11). Also at issue is whether the Bank's plan discriminates unfairly with respect to MCJV, a creditor who is impaired under, and who has not accepted the plan. See 11 U.S.C. Section 1129(b)(1) (requiring that the plan not discriminate unfairly with respect to classes of impaired claims). *911 F.2d at 879-880.*

The court of appeals concluded that a valid claim of a creditor who is also an equity security holder is not to be subordinated as an insider based on classification under Section 1122, but should be treated equally with the claim of a creditor who is not also an equity security holder. *Ibid.* The court also concluded that the facts did not warrant equitable subordination of MCJV's claim 502 for unpaid rent under 11 U.S.C. Section 510(c). Thus, the classification structure of the Bank's plan is void, the Second Amendment,[18] which was approved *ex parte*

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[18] The Second Amendment to the Bank's plan provided for a loan to the Trustee to pay MCJV's claim and the issuance of a Trustee's Certificate, secured by *all* of the Trust Property, including a lien on the partnership interest of Theodore B. Gould's estate in the Miami Center Joint Venture. (The prospective lien on Theodore B. Gould's interest was a default under the Joint Venture Agreement which diminished its value of *$26,940,000* and made the partnership interest unsaleable.)

On October 10, 1985, after the Bank granted indemnification to Smith, the Defendants entered into a postconfirmation modification of the Second Amendment, without notice or court hearing (commonly referred to as the "Midnight Amendment"), in which the Trustee consented to issue a Liquidating Trustee's

without satisfying the disclosure requirements of 11 U.S.C. Section 1127(b), is a nullity, and the Defendant Bank of New York was liable, without recourse, for the payment of MCJV's claim under the Absolute Priority Rule.[19]

WHEREFORE, for the foregoing reasons, Plaintiffs demand that this Court's Order dismissing the subject Complaint, alleging negligence, breach of fiduciary duty, breach of contract, and conversion against Defendants be vacated in accordance with the Federal Rules of Civil Procedure, Rule 60(b)(5).

Respectfully submitted,

/s/
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/s/
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Certificate to the Bank in the event that the Bank was held liable for payment of MCJV's claim pursuant to court order.

[19] See *Northern Pacific Railway v. Boyd*, 228 U.S. 482, 504 (1912): "If purposely . . . a single creditor was not paid, or provided for in reorganization, he could assert his superior rights against the subordinate interests . . . in the property transferred . . . [since] the property was a trust fund charged primarily with the payment of . . . liabilities."

APPENDIX G

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. § 1452. Removal of claims related to bankruptcy cases.

(a) A party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

2. 28 U.S.C. § 1334. Bankruptcy cases and proceedings.

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11 [11 U.S.C. §§ 101 et seq.].

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 [11 USCS §§ 101 et seq.], or arising in or related to cases under title 11 [11 USCS §§ 101 et seq.]

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular pro- ceeding arising under title 11 [11 USCS §§ 101 et seq.], or arising in or related to a case under title 11 [11 USCS §§ 101 et seq.].

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 [11 USCS §§ 101 et seq.] but not arising under title 11 [11 USCS §§ 101 et seq.] or arising in a case under title 11 [11 USCS §§ 101

et seq.], with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated in a State forum of appropriate jurisdiction. Any decision to abstain made under this subsection is not reviewable by appeal or otherwise. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code [11 USCS § 362], as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 [11 USCS §§ 101 et seq.] is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of the estate.

3. **28 U.S.C. § 157, Procedures, provides in relevant part:**

(a) Each district court may provide that any or all cases under title 11 [11 USCS §§ 101 et seq.] and any or all proceedings arising under title 11 [11 USCS §§ 101 et seq.] or arising in or related to a case under title 11 [11 USCS §§ 101 et seq.] shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 [11 USCS §§ 101 et seq.] and all core proceedings arising under title 11 [11 USCS §§ 101 et seq.], or arising in a case under title 11 [11 USCS §§ 101 et seq.], referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title [28 USCS § 158].

(2) Core proceedings include, but are not limited to –

(A) matters concerning the administration of the estate. . . .

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship. . . .

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11 [11 USCS §§ 101 et seq.]. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code [subsec. (b)(2)(B) of this section], shall not be subject to the mandatory abstention provisions of section 1334(c)(2) [28 USCS § 1334(c)(2)]. . . .

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11 [11 USCS §§ 101 et seq.]. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the

consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 [11 USCS §§ 101 et seq.] to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title [28 USCS § 158].

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 [11 USCS §§ 101 et seq.] and other laws of the United States regulating organizations or activities affecting interstate commerce.

4. **11 USCS § 105. Power of court, provides:**

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title [11 USCS §§ 101 et seq.]. . . .

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title [11 USCS §§ 101 et seq.]

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title [11 USCS §§ 101 et seq.] shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28 [28 USCS §§ 1 et seq.]. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 [28 USCS §§ 151 et seq.] from its operation.

5. Section 60(b), MISTAKES, INADVERTENCE, EXCUSABLE NEGLECT, NEWLY DISCOVERED EVIDENCE, FRAUD, etc., of RUle 60, *Relief from Judgment or Order*, of the Federal Rules of Civil Procedure, provides, in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment shall have a prospective application. . . . The motion shall be made within a reasonable time,. . . . A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. Section 1655, or to set aside a judgment for fraud upon the court. . . .

6. Rule 9024, Relief from Judgment or Order

> Rule 60 F.R.Civ.P. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(b), (2) a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by § 727(e) of the Code, and (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144, § 1230, or § 1330.